SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 55

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET AL., PETITIONERS,

vs.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

No. —

PETER A. CLEARY, S. N. SCHAFER, and H. F. IRACH, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, Plaintiffs and Appellees

v.

HOPKINS STREET BUILDING AND LOAN ASSOCIATION, a Wisconsin Corporation; Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as President, Vice-President, Secretary and Treasurer, Respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Street Building and Loan Association, and their respective successors in office, Defendants and Appellants.

PETITION FOR APPEAL—Filed April 13, 1935

To the Chief Justice of the Supreme Court of the State of Wisconsin:

The Hopkins Federal Savings and Loan Association, a corporation organized and existing under and by virtue of the laws of the United States of America, by conversion of Hopkins Street Building and Loan Association, a Wisconsin corporation, Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as Pres[illegible], Vice-President, Secretary and Treasurer, respectively, [illegible] Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Federal Savings and Loan Association, and their respective successors in office, your petitioners, defendants and appellants in the above [fol. 2] entitled cause, show by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision in this cause in the Supreme Court of the State of Wisconsin, the same being the highest court of the State of Wisconsin, and the decision therein being final, manifest error has occurred, greatly to the damage of your petitioners.

The case is one in which Peter A. Cleary, S. N. Schafer, and H. F. Ibach, constituting the Banking Commission of the Banking Department of the State of Wisconsin, plaintiffs and appellees in the above entitled cause, obtained a decision from this court declaring the conversion of petitioner association from Hopkins Street Building and Loan Association, a Wisconsin corporation, into Hopkins Federal Savings and Loan Association, a federal corporation, to be null, void and of no effect and petitioner association still to be a Wisconsin building and loan association subject to the jurisdiction of the Banking Commission of the State of Wisconsin. Such declaration was made notwithstanding that a charter as a corporation organized and existing under and by virtue of the laws of the United States of America had been issued to petitioner association by the Federal Home Loan Bank Board pursuant to authority vested in such Board by Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended, by the Act of Congress approved April 27, 1934 (48 Stat. 643, 646) after petitioners had complied with all the rules and regulations of the Federal Home Loan Bank Board pursuant to said Act of Congress, and with all the provisions and requirements of said Act of Congress, and in particular, with the requirements of paragraph (i) of Section 5 of said Act (48 Stat. 128, 134), as amended, which em-[fol. 3] powered any member of a federal home loan bank to convert itself into a federal savings and loan association. Such declaration was made also notwithstanding that petitioner association was a member of the Federal Home Loan Bank of Chicago. Pursuant to said decision, a writ of injunction issued, December 19, 1934, commanding petitioner association, its officers and directors, to operate petitioner association as a Wisconsin building and loan association under the laws of the State of Wisconsin and under the direction and jurisdiction of the Banking Commission of the State of Wisconsin, and enjoining and restraining petitioners from operating petitioner association as a federal savings and loan association.

As appears from the record and proceedings in this cause and the decision filed therein, there was drawn in question the validity of a statute of the United States, to-wit: Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by the Act of Congress ap-

proved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress, as amended, and the decision in this cause of the Supreme Court of the State of Wisconsin, being a final decision of the highest court of said State, is against the validity of such statute of the United States. As appears from the record and proceedings in this cause and the decision filed therein, there was specifically set up and claimed by petitioners certain titles, rights, privileges and immunities under said statute of the United States and said decision in this cause denies such titles, rights, privileges and immunities claimed under said statute of the United States.

Said decision held that petitioner association originally [fol. 4] organized as a Wisconsin corporation under and by virtue of the laws of the State of Wisconsin, to wit: Chapter 215 of the Wisconsin Statutes, as amended, had no power, under such statute or under Article XI, Section 1 of the Constitution of said State, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government to-wit: the government of the United States of America notwithstanding that under Section 2, Article VI of the Constitution of the United States said Act of Congress is the supreme law of the land. Such holding drew in question the validity of said Statute and the Constitution of the State of Wisconsin on the ground of their being repugnant to the Constitution and laws of the United States and is in favor of their validity.

The decision of the said Supreme Court of Wisconsin was made, rendered and filed on December 11, 1934, the writ of injunction pursuant to said decision issued December 19, 1934, and the final order denying the allowance of a petition for rehearing from said decision was made and entered on February 5, 1935.

Petitioners aver that the said statute of the United States, at the time of the institution of this action, had not expired by its own limitation, and was not altered or repealed by law.

That, therefore, in accordance with Section 237 (a) of the Judicial Code (U. S. C., Title 28, Sec. 344), and in accordance with the Revised Rules of the Supreme Court of the United States, your petitioners respectfully show this Court that the case is one in which, under the legislation

in force when the Act of Congress approved January 31, [fol. 5] 1928 (45 Stat. 54) was passed; to wit: under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a Writ of Error, as a matter of right.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the Assignment of Errors, filed herewith, pursuant to the Revised Rules of the Supreme Court of the United States; and there is likewise filed herewith as required by the Revised Rules of the Supreme Court of the United States, a statement as to the jurisdiction of the Supreme Court of the United States.

Wherefore, petitioners pray:

1. For the allowance of an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in order that said decision may be examined and reversed; the writ of injunction issued pursuant thereto may be quashed and the injunction dissolved;

2. That a transcript of the record, proceedings and papers in this cause be made and transmitted to the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Wisconsin under his hand and the seal of the Supreme Court of the State of Wisconsin, pursuant to the Revised Rules of the Supreme Court of the United States;

3. That an order be entered fixing the amount of security for costs which petitioners shall furnish;

4. That upon proper security being furnished, all execution and other proceedings in this cause in the Supreme Court of the State of Wisconsin be stayed until the final determination of this cause upon this appeal to the Su- [fol. 6] preme Court of the United States.

B. F. Saltzstein, E. J. Gross, Attorneys for Petitioners. Emery J. Woodall, Lyman W. Sherwood, Of Counsel.

[fol. 7] [File endorsement omitted.]

[fol. 8] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted.]

ORDER ALLOWING APPEAL—Filed April 13, 1935

Hopkins Federal Savings and Loan Association, a corporation organized and existing under and by virtue of the laws of the United States of America, by conversion of Hopkins Street Building and Loan Association, a Wisconsin corporation, Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Federal Savings and Loan Association, and their respective successors in office, the appellants in the above entitled cause, [fol. 9] and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Wisconsin, on the 11th day of December, 1934, and from each and every part thereof, and having presented and filed their Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, pursuant to the statutes of the United States and Revised Rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall pursuant to the Revised Rules of the Supreme Court of the United States prepare and certify under his hand and the Seal of the Supreme Court of the State of Wisconsin a transcript of the record and all opinions delivered in this cause and transmit the same to the Supreme Court of the United States, so that the same shall be filed in the Supreme Court of the United States

pursuant to the Revised Rules of the Supreme Court of the United States by or before the return day.

And it is further ordered that the bond heretofore given (dated Feb. 8, 1935) by the said appellants shall stand as a good and sufficient supersedeas bond, in the sum of One Thousand ($1,000.00) Dollars, that said appellants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, and that such supersedeas bond, when filed and approved, shall stay all execution and other proceedings in this cause in the [fol. 10] Supreme Court of the State of Wisconsin until the final disposition of this cause by the Supreme Court of the United States.

Dated this 13th day of April, A. D. 1935.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 11] [File endorsement omitted.]

Original

[fol. 12] In Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed April 13, 1935

The Hopkins Federal Savings and Loan Association, a corporation organized and existing under and by virtue of the laws of the United States of America, by conversion of Hopkins Street Building and Loan Association, a Wisconsin corporation, Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Federal Savings and Loan Association, and their respective successors in office, [fol. 13] appellants herein, as required by Section 997 of the Revised Statutes (U. S. C., Title 28, Sec. 862) and in accordance with Rule 9 of the Revised Rules of the Supreme

Court of the United States, assign the following errors in the record and proceedings in the Supreme Court of the State of Wisconsin in the above entitled cause:

1. The Supreme Court of the State of Wisconsin under the law and evidence in this cause erred

(a) In determining

(i) That the conversion by appellant association into a federal savings and loan association was null, void and of no effect,

(ii) That appellant association was still a Wisconsin building and loan association, and

(iii) That appellant association was still subject to the jurisdiction of the Wisconsin Banking Commission;

(b) In commanding appellants to operate appellant association as a Wisconsin building and loan association under the direction and jurisdiction of Wisconsin Banking Commission; and

(c) In restraining and enjoining appellants from operating appellant association as a federal savings and loan association.

2. The Supreme Court of the State of Wisconsin erred under the pleadings in this cause in its decision and by its writ of injunction in holding Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended, and more particularly paragraph (i) of Section 5 of said Act, as amended (48 Stat. 643, 646), invalid under the Constitution of the United States of America.

3. The Supreme Court of the State of Wisconsin erred

[fol. 14] (a) In refusing in its decision to recognize and give effect to an Act of Congress validly enacted in the execution of the powers vested in the Federal Congress by the Constitution of the United States of America, to-wit, Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended:

(b) By its writ of injunction, in retarding, impeding, burdening and controlling the operations of said Act of Congress; and

(c) In denying titles, rights, privileges and immunities of appellants specially set up and claimed by appellants under said Act of Congress.

4. The Supreme Court of the State of Wisconsin erred in holding Chapter 215 of the Statutes of Wisconsin, Section 1 of Article IX of the Constitution of the State of Wisconsin, valid as not repugnant to paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 646), or to Section 2 of Article VI of the Constitution of the United States, which provides that the laws of the United States are the supreme law of the land. This is particularly true when the Supreme Court of the State of Wisconsin in said holding construed said State Statute and said section of the State Constitution as blocking the flow of power from the Congress of the United States under said Act of Congress, as amended, (48 Stat. 643, 646) to appellant association, so as to enable it to divest itself of its state charter and accept a charter from the sovereign Government of the United States by conversion when Wisconsin Statutes as was recognized in said decision of the Supreme Court of the State of Wisconsin,

(a) Were silent upon the subject of conversion, and

(b) Neither expressly prohibited conversion nor expressly empowered appellant association so to convert.

5. The Supreme Court of the State of Wisconsin erred in holding that paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646), merely permitted Wisconsin associations to convert only if and when the legislature of the State of Wisconsin [fol. 15] enacted legislation consenting to such conversion, but did not empower conversion of appellant association without legislation of the State of Wisconsin consenting to such conversion.

Prayer for Reversal

For which errors, appellants pray

(1) That the decision of the Supreme Court of the State of Wisconsin filed December 11, 1934 in the above entitled cause be reversed,

(2) That the writ of injunction issued pursuant to said decision be quashed and the injunction be dissolved, and

(3) That a judgment be rendered in favor of appellants, and for costs.

B. F. Saltzstein, E. J. Gross, Attorneys for Petitioners. Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fols. 16-34] [File endorsement omitted.]

Service admitted this 13th day of April, 1935.
J. E. Finnegan, Atty. Gen.

[fols. 35-37] Citation in usual form showing service on Peter A. Cleary et al., filed April 15, 1935, omitted in printing.

[fols. 38-42] Bond on appeal for $1,000.00, approved Feb. 8, 1935, omitted in printing.

[fol. 43] [File endorsement omitted]

Original

In Supreme Court of United States

[Title omitted]

Præcipe for Transcript of Record—Filed April 13, 1935

To the Clerk of the Supreme Court of the State of Wisconsin:

Appellants in the above entitled cause hereby indicate the portions of the record to be incorporated in the transcript thereof as follows:

Notice of petition to Supreme Court of the State of Wisconsin for leave to institute an original action therein dated September 5, 1934.

Petition for leave to commence an original action verified September 5, 1934.

Order granting petition for leave to commence original action entered September 14, 1934.

[fol. 44] Answer filed September 29, 1934.

Decision filed December 11, 1934.

Writ of injunction issued December 19, 1934.

Motion for rehearing filed December 19, 1934.

Order denying motion for rehearing entered February 5, 1935.

B. F. Saltzstein, E. J. Gross, Attorneys for Petitioners. Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fol. 45] [File endorsement omitted.]

[fol. 46] [Caption omitted.]

[fol. 47] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO INSTITUTE ORIGINAL ACTION —Filed Sept. 13, 1934

To the Defendants Above Named:

Please take notice, that upon the verified petition hereunto annexed, the above named plaintiffs, by their attorneys, will apply for leave of this Honorable Court to institute an original action herein, on Friday, September 14, 1934 before the Supreme Court, State Capitol, Madison, Wisconsin.

Dated this 5th day of September, 1934.

J. E. Finnegan, Attorney General, John E. Martin, Assistant Attorney General, Attorneys for Plaintiffs. Benjamin Poss, of Counsel.

7/42/34. Omitted service.

[fol. 48] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION—Filed Sept. 13, 1934

To the Honorable the Supreme Court of the State of Wisconsin:

The petition of the above named plaintiffs respectfully alleges the following:

1. Your petitioners Peter A. Cleary, S. N. Schafer, and H. F. Ibach, constitute the Banking Commission of the Banking Department of the State of Wisconsin created under and by virtue of the provisions of Chapter 220 of the Wisconsin statutes. Pursuant to the provisions of Chapter 215 of the Wisconsin statutes said Banking Commission is vested with the control and supervision of all building and loan associations organized under the laws of the State of Wisconsin or other similar laws, or author-[fol. 49] ized to transact business in the State of Wisconsin.

2. Hopkins Street Building and Loan Association was organized as a building and loan association under and by virtue of the laws of the State of Wisconsin in the year 1925. Thereafter it conducted its business as a state building and loan association in the City and County of Milwaukee and State of Wisconsin.

3. As petitioners are informed and believe Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske were the duly elected, qualified and acting President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, the duly elected, qualified, and acting Directors of said Hopkins Street Building and Loan Association at the time said Association applied to the Federal Home Loan Bank Board for permission to convert itself into a Federal Savings and Loan Association, as hereinafter set forth.

4. On or about July 22, 1932, the Congress of the United States of America enacted the Federal Home Loan Bank Act which created Federal Home Loan Banks throughout the United States (12 U. S. C. A., 1933 Supplement, page 186 et seq.). By virtue of the provisions of said Act, state building and loan associations among others were eligible to become members of and borrowers from a Federal Home Loan Bank. By the enactment of Sec. 215.08 of the Wisconsin statutes on July 10, 1933, the legislature of the State of Wisconsin authorized Wisconsin building and loan associations, with the approval of the Commissioner of Banking, to become members of and borrowers from a Federal Home Loan Bank.

[fol. 50] 5. Pursuant to the enactments mentioned in above paragraph designated "4" and with the consent and approval of the Banking Department of the State of Wisconsin the said Hopkins Street Building and Loan Association became a member of the Federal Home Loan Bank of Chicago, a bank established under the Federal Home Loan Bank Act.

6. On or about June 13, 1933, the Congress of the United States of America enacted the Home Owners' Loan Act of 1933, (12 U. S. C. A. 1933 Supp. page 199 et seq.), a copy of which as amended to date is annexed hereto marked Exhibit "A" and made a part hereof. By Section 5 of said Act (12 U. S. C. A. Sec. 1464) the Federal Home Loan Bank Board was authorized among other things to provide for the organization of associations to be known as Federal savings and loan associations and to issue charters therefor. Sec. 5 (i) of said Act originally provided as follows:

"Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided by the law under which it operates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this act."

On April 27, 1934, said Sec. 5 (i) was amended to read as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

[fol. 51] 7. The said Hopkins Street Building and Loan Association made application in the month of May, 1934, without the consent or authority of the Banking Commission of the State of Wisconsin, to the Federal Home Loan Bank Board for permission to convert itself into a federal savings and loan association under the provisions of Sec. 5 (i) of the Federal Home Owners' Loan Act of 1933 as amended. Said Board granted said permission to the Hopkins Street Building and Loan Association and thereafter the said association proceeded in the manner provided by the rules and regulations prescribed by said Board and on June 2, 1934, a charter was issued by said Board to said association purporting to authorize it to operate as a federal savings and loan association under the name of Hopkins Federal Savings and Loan Association.

8. Said attempted conversion by said Hopkins Street Building and Loan Association into a federal savings and loan association and all steps taken in connection therewith were without consent or authority and over the protests of the Banking Commission of the State of Wisconsin.

9. As petitioners are informed and believe, the United States of America has no right or power to create federal savings and loan associations; that the provisions of Sec. 5 of the Home Owners' Loan Act of 1933 as amended, purporting to authorize the creation of said federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such associations; that the creation of said associations is wholly out-

side the powers vested in Congress by Section 8 of Article I of the Constitution or any other provision of the Constitution of the United States and is in violation of Article [fol. 52] X of the Amendments to the Constitution of the United States.

10. As petitioners are informed and believe, the provisions of Sec. 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor" is an unconstitutional delegation of the legislative power by the Congress of the United States in violation of Section 1 of Article I of the Constitution of the United States.

11. As petitioners are informed and believe, the said Hopkins Street Building and Loan Association has and had no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without state con- [fol. 53] sent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the United States, or any other provision of the Federal Constitution, and is in violation of Article X of the Amendments to the Constitution of the United States.

12. As petitioners are informed and believe, there are stockholders of the said association who do not desire the

said association to convert and that the provisions of said Sec. 5 (i) deny to all stockholders of the said association who do not desire to convert the equal protection of the laws and deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States.

13. Since said June 2, 1934, the said Hopkins Street Building and Loan Association has held itself out to the public as a federal association. Said association, its officers and directors, have refused to recognize any right or jurisdiction over the association and have contended, and still contend, that the provisions of Chapter 215 of the Wisconsin statutes are no longer applicable to it and that they need not obey any request or demand of the Banking Department of the State of Wisconsin.

14. Your petitioners further represent that the controversy set forth herein involves a matter publici juris. It affects the sovereignty of the State and its franchises or prerogatives; that other building and loan associations organized and existing under the laws of the State of Wisconsin are contemplating or taking steps toward conversion; that in consequence a speedy and final determination of the questions involved herein is necessary and the remedy in the Circuit Courts of this State is inadequate.

Your petitioners respectfully pray that this Honorable [fol. 54] Court grant leave to them to institute an original proceeding in this Court in which the Banking Commission of the State of Wisconsin will be plaintiff and the Hopkins Street Building and Loan Association, its officers and directors will be the defendants, for the purpose of granting to your petitioners judgment as follows:

(1) Declaring said attempted conversion by said Hopkins Street Building and Loan Association to be null, void and of no effect.

(2) Declaring that said association is under the jurisdiction of the Banking Commission of the State of Wisconsin as provided by statute.

(3) Compelling the officers and directors of said association to operate said association as a Wisconsin building and loan association or to wind up its affairs as such associa-

tion in the manner provided by the statutes of the State of Wisconsin.

(4) Restraining and enjoining said association, its officers and directors, from operating as a federal savings and loan association.

(5) And for such other and further relief as may be just and equitable in the premises.

Respectfully submitted,
The Banking Commission of the State of Wisconsin.
By: Peter A. Cleary, Chairman.

[fol. 55] *Duly sworn to by Peter A. Cleary. Jurat omitted in printing.*

[fol. 56] EXHIBIT "A" TO PETITION

Home Owners' Loan Corporation, Washington, D. C.

Home Owners' Loan Act of 1933 as Amended and other Laws Pertaining to the Home Owners' Loan Corporation—May, 1934

[fol. 57] This pamphlet contains the Home Owners' Loan Act of 1933, as amended. The amendments are printed in bold-face type and are identified in footnotes. There are also set forth in the footnotes the superseded portions of the original act. Provisions of other laws pertaining to the Home Owners' Loan Corporation are printed in an appendix. For easy reference an index is appended.

[fol. 58] (Reprinted with index for Home Owners' Loan Corporation)

Home Owners' Loan Act of 1933 as Amended[1]

[Public, No. 43—73d Congress]
[H. R. 5240]

An Act to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them

[1] As amended by an Act to guarantee the bonds of the Home Owners' Loan Corporation, to amend the Home Owners' Loan Act of 1933, and for other purposes. [Public, No. 178—73d Congress.] [S—2999.] Approved April 27, 1934.

and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Home Owners' Loan Act of 1933."

Definitions

Sec. 2. As used in this Act—

(a) The term "Board" means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 4 of this Act.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold under a renewable lease for not less than ninety-nine years, upon which there is located a dwelling for not more than four families, used by the owner as a home or held by him as his homestead, and having a value not exceeding $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 5 of this Act.

Repeal of Direct Loan Provision of Federal Home Loan Bank Act

Sec. 3. Subsection (d) of section 4 of the Federal Home Loan Bank Act (providing for direct loans to home owners) is hereby repealed.

Creation of Home Owners' Loan Corporation

Sec. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners'

Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be [fol. 59] sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

(b) The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscriptions shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 9 of the Reconstruction Finance Corporation Act, as amended, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) (1) The Corporation is authorized to issue bonds in an aggregate amount not to exceed $2,000,000,000, which may be sold by the Corporation to obtain funds for carrying out the purposes of this section, or exchanged as hereinafter provided. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall

bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any [fol. 60] securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income,

shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Secretary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection, as amended, shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on the date this subsection, as amended, takes effect.[2]

(c) (2) The amendments made by subsection (c) (1) of this section (except with respect to refunding) shall not apply to any bonds heretofore issued by the Home Owners' Loan Corporation under such section 4 (c), or to any bonds hereafter issued in compliance with commitments of the

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[2] As amended by section 1 (a) of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

Corporation outstanding on the date of enactment of this Act.[3]

[fol. 61] (d) The Corporation is authorized, for a period of three years after the date of enactment of this Act, (1)

[3] This division of subsection (c) is new and was added by section 1 (b) of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation. Section 4 (c) of Home Owners' Loan Act of 1933, read formerly as follows:

"The Corporation is authorized to issue bonds in an aggregate amount not to exceed $2,000,000,000, which may be sold by the Corporation to obtain funds for carrying out the purposes of this section, or exchanged as hereinafter provided. Such bonds shall be issued in such denominations as the Board shall prescribe, shall mature within a period of not more than eighteen years from the date of their issue, shall bear interest at a rate not to exceed 4 per centum per annum, and shall be fully and unconditionally guaranteed as to interest only by the United States, and such guaranty shall be expressed on the face thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the interest on any such bonds, the Secretary of the Treasury shall pay to the Corporation the amount of such interest, which is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, and the Corporation shall pay the amount of such interest to the holders of the bonds. Upon the payment of such interest by the Secretary of the Treasury the amount so paid shall become an obligation to the United States of the Corporation and shall bear interest at the same rate as that borne by the bonds upon which the interest has been so paid. The bonds issued by the corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to the date of the enactment of this Act, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding $50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case $14,000, or 80 percentum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semiannually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the

security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold under a lease renewable for not less than ninety-nine years, upon which there is located a [fol. 62] dwelling for not more than four families used by the owner as a home or held by him as a homestead and having a value not exceeding $20,000. No discrimination shall be made under this Act against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.[4]

(e) The Corporation is further authorized, for a period of three years from the date of enactment of this Act, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) The Corporation is further authorized, for a period of three years from the date of enactment of this Act, in any case in which the holder of a home mortgage or other obligation or lien elgible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed

[4] As amended by section 3 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation, deleting from the sixth sentence of the Home Owners' Loan Act of 1933, the words, "and no payment of any installment of principal shall be required during the period of three years from the date this Act takes effect if the home owner shall not be in default with respect to any other condition or covenant of his mortgage."

40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.[5]

(h) The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this Act.

[fol. 63] (i) Any person indebted to the Corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) The Corporation shall have power to select, employ, and fix the compensation of such officer, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provi-

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[5] As amended by Section 4 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation. Section 4 (g) of Home Owners' Loan Act of 1933, read formerly as follows:

"The Corporation is further authorized, for a period of three years from the date of the enactment of this Act, to exchange bonds and to advance cash, subject to the limitations provided in subsection (d) of this section, to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee within two years prior to such exchange or advance."

sions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board.

(k) The Board is authorized to make such bylaws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accomulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.[6]

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[6] The third sentence of subsection (k) is new and was added by section 13 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

(l) No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: Provided, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant, or in any case in which the home mortgage or other obligation or lien is held by an institution which is in liquidation.[7]

[fol. 64] (m) In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilitation, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take a new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed $200,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.[8]

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[7] Subsection (l) is new and was added by section 2 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

[8] Subsection (m) is new and was added by section 2 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

Federal Savings and Loan Associations

SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: Provided, That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: And provided further, That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank.

(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such associa-
[fol. 65] tion, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of

the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenient shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary.

of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purposes of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

[fol. 66] (h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local or mutual or cooperative thrift and home financing institutions.

(i) Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.[9]

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[9]As amended by section 6 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation. Section 5 (i) read formerly as follows:

"Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided

(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.[10]

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by the law under which it operates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

[10] Subsection (j) is new and was added by section 5 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

[fol. 67] (k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.[11]

Encouragement of Savings and Home Financing

SEC. 6. To enable the Board to encourage local thrift and local home financing and to promote, organize, and develop the associations herein provided for or similar associations organized under local laws, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $150,000, to be immediately available and remain available until expended, subject to the call of the Board, which sum, or so much thereof as may be necessary, the Board is authorized to use in its discretion for the accomplishment of the purposes of this section without regard to the provisions of any other law governing the expenditure of public funds. For the purposes of this section the Secretary of the Treasury is authorized and directed to allocate and make immediately available to the Board, out of the funds appropriated pursuant to section 5 (g), the sum of $500,000. Such sum shall be in addition to the funds appropriated pursuant to this section, and shall be subject to the call of the Board and shall remain available until expended.[12]

SEC. 7. The provisions of this Act shall apply to the continental United States, to the Territories of Alaska and Hawaii, and to Puerto Rico and the Virgin Islands.

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[11] Subsection (k) is new and was added by section 5 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

[12] The last two sentences of section 6 are new and were added by section 11 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

Penalties

SEC. 8. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine or not more than $5,000, or by imprisonment for not more than two years, or both.

(b) Whoever (1) falsely makes, forges, or counterfeits any note, debenture, bond, or other obligation or coupon, in imitation of or purporting to be a note, debenture, bond, or other obligation, or coupon, issued by the Home Owners' Loan Corporation or an association; or (2) passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, debenture, bond or other [fol. 68] obligation, or coupon, purporting to have been issued by the Home Owners' Loan Corporation or an association, knowing the same to be false, forged, or counterfeited; or (3) falsely alters any note, debenture, bond or other obligation, or coupon, issued or purporting to have been issued by the Home Owners' Loan Corporation or an association; or (4) passes, utters, or publishes, or attempts to pass, utter, or publish, as true any falsely altered or spurious note, debenture, bond, or other obligation, or coupon, issued or purporting to have been issued by the Home Owners' Loan Corporation or an association, knowing the same to be falsely altered or spurious, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(c) Whoever, being connected in any capacity with the Board or the Home Owners' Loan Corporation or an association (1) embezzles, abstracts, purloins, or wilfully misapplies any moneys, funds, securities, or other things of value, whether belonging to it or pledged or otherwise intrusted to it; or (2) with intent to defraud the Board or the Home Owners' Loan Corporation or an association, or any other body politic or corporate, or any individual, or to deceive any officer, auditor, or examiners of the Board or the Home Owners' Loan Corporation or an association,

makes any false entry in any book, report, or statement of or to the Board or the Home Owners' Loan Corporation or an association, or, without being duly authorized, draws any order or issues, puts forth, or assigns any note, debenture, bond, or other obligation, or draft, mortgage, judgment, or decree thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(d) The provisions of sections 112, 113, 114, 115, 116, and 117 of the Criminal Code of the United States (U. S. C., title 18, secs. 202 to 207, inclusive), insofar as applicable, are extended to apply to contracts or agreements of the Home Owners' Loan Corporation and an association under this Act, which, for the purposes hereof, shall be held to include advances, loans, discounts, and purchase and repurchase agreements; extensions and renewals thereof; and acceptances, releases, and substitutions of security therefor.

(e) No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years or both.[18]

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[18] As amended by section 12 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation. Section 8 (e) read formerly as follows:

"No person, partnership, association, or corporation shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like

[fol. 69] Loans to Federal Home Loan Banks

Sec. 9. The Home Owners' Loan Corporation is authorized to buy bonds or debentures of Federal Home Loan Banks upon such terms as may be agreed upon or to loan money to Federal Home Loan Banks upon such terms as may be agreed upon but not to exceed $50,000,000 shall be invested or advanced under this section.[14]

Separability Provision

Sec. 10. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.[15]

Approved June 13, 1933.
Approved as amended, April 27, 1934.

[fol. 70] Appendix

Amendment to the Federal Home Loan Bank Act pertaining to the Home Owners' Loan Corporation contained in an Act to guarantee the bonds of the Home Owners' Loan Corporation.

Sec. 10. The first sentence of section 10 (b) of the Federal Home Loan Bank Act, as amended, is amended by inserting before the period at the end thereof a comma and the following: "unless the amount of the debt secured by

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necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both."

[14] Section 9 is new and was added by section 9 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

[15] This was section 9 of the Home Owners' Loan Act of 1933, and the same provision is contained in section 15 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

such home mortgage is less than 50 per centum of the value of the real estate with respect to which the home mortgage was given, as such real estate was appraised when the home mortgage was made."

Amendments to the Federal Reserve Act pertaining to the Home Owners' Loan Corporation contained in an Act to guarantee the bonds of the Home Owners' Loan Corporation.

Sec. 7. (a) The first sentence of the eighth paragraph of section 13 of the Federal Reserve Act, as amended, is further amended by inserting before the semicolon, after the words "Federal Farm Mortgage Corporation Act", a comma and the following: "or by the deposit or pledge of bonds issued under the provisions of subsection (c) of section 4 of the Home Owners' Loan Act of 1933, as amended."

(b) Paragraph (b) of section 14 of the Federal Reserve Act, as amended, is further amended by inserting after the words "bonds of the Federal Farm Mortgage Corporation having maturities from date of purchase of not exceeding six months", a comma and the following: "bonds issued under the provisions of subsection (c) of section 4 of the Home Owners' Loan Act of 1933, as amended, and having maturities from date of purchase of not exceeding six months".

Sec. 8. The Federal Reserve banks are authorized, with the approval of the Secretary of the Treasury, to act as depositaries, custodians, and fiscal agents for the Home Owners' Loan Corporation.

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[fol. 79] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING LEAVE TO COMMENCE ORIGINAL ACTION—Sept. 14, 1934

And now at this day came the said plaintiffs and filed their petition herein and moved the Court for leave to commence an original action in the Supreme Court for declaratory relief as prayed for in the petition, which motion having been argued by Joseph P. Brazy for petitioner.

It is now here ordered, that leave be granted to commence an original action in this Court, in which the Banking Commission of the State of Wisconsin is plaintiff and the Hopkins Street Building and Loan Association, its officers and directors, are defendants. Petition will stand as complainant and defendants will answer or demur thereto. Cause, by consent of the parties, to be placed on the August 1934 calendar and assigned for argument at the foot of the October assignment.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 80] [Endorsed:] State of Wisconsin, Supreme Court. State ex rel. Peter A. Cleary et al. Plaintiffs, against Hopkins Street Building and Loan Association et al., Defendants. Transcript of Order.

[fol. 81] [Endorsed:] Service admitted this 28th day of September, 1934. J. E. Finnegan, Atty. Gen.; J. E. Martin, Ass't Atty. Gen.; Benj. Ross, of Counsel, by J. P. Brazy. Mailed for filing Sept. 28, 1934.

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ANSWER TO PETITION—Filed Sept. 29, 1934

Now come the above named defendants and Hopkins Federal Savings and Loan Association, a national corpora-

tion, successor by conversion to Hopkins Street Building and Loan Association, a Wisconsin corporation, and for answer to the petition herein, admit, deny and allege as follows:

I

Admit the allegations of fact contained in paragraphs numbered one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), thirteen (13) and fourteen (14) of said petition, and admit that the conversion of said Hopkins Street Building and Loan Association into a Federal Savings and Loan Association, and all steps taken in connection therewith, were without consent or authority and over the protests of the Banking Commission of the State of Wisconsin.

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II

Deny the conclusions of law contained in paragraphs numbered nine (9), ten (10) and eleven (11) of said petition.

III

Deny the allegations contained in paragraph numbered twelve (12) of said petition.

IV

Further answering said petition, the defendants allege as follows:

(a) That pursuant to the enactments set forth in paragraph four (4) of the Petition, the said Hopkins Street Building and Loan Association became a member of the Federal Home Loan Bank of Chicago, a bank established under the Federal Home Loan Bank Act, and was a member thereof during all of the times mentioned in said original petition.

(b) That at all of the times set forth in the original petition, or referred to therein, the by-laws of said Hopkins Street Building and Loan Association contained the following provisions and only the following provisions concerning special meetings of the shareholders and notices therefor:

"Article XXXV

Meetings—Regular and Special

"Section 1. The directors shall hold regular meetings on the last Friday of each month at the office of the association at such hour as they shall designate; or at such other place and time upon which they may agree."

"Section 2. Special meetings of the shareholders may be called by the President, and shall be called by him upon written request of twenty stockholders. Special meetings of the directors may be called by the President, and shall be called by him on written request of three directors."

[fol. 83] "Article XXXVI

Legal Notice

"Section 1. Notice of the time and place of holding all stockholders' meetings shall be given by mailing a notice to each stockholder at his last given post-office address not less than ten days before such meeting, or personally serving each member with a written or printed notice of such meeting."

"Section 2. It shall be sufficient notice whenever the association makes any demand upon any member, officer, director, or committeeman to deposit such demand at his last given post-office address, or by personally serving upon him a written or printed notice of such demand."

"Section 3. Every member shall notify the secretary immediately of any change of address."

(c) That as a result of a vote of the Board of Directors of said Hopkins Street Building and Loan Association, at a meeting thereof duly called and held, said association requested the Federal Home Loan Bank of Chicago to make an examination of its affairs and an appraisal of its assets for the purpose of determining whether conversion into a Federal Savings and Loan Association appeared to said Board of Directors and to said Federal Home Loan Bank to be feasible. Thereupon, prior to May 1, 1934, said Federal Home Loan Bank made such examination and appraisal.

(d) That after such examination and appraisal was made by said Federal Home Loan Bank, it appeared to the Board

of Directors of said Hopkins Street Building and Loan Association and to said Federal Home Loan Bank, that such conversion was feasible and advisable.

(e) That thereafter, prior to May 10th, 1934, the Board of Directors of said Hopkins Street Building and Loan Association authorized the calling of a special meeting of the shareholders of said association on May 31st, 1934, for the purpose of submitting the matter of conversion to a vote of the shareholders.

[fol. 84] (f) That thereafter, prior to May 10th, 1934, a meeting of said Hopkins Street Building and Loan Association was duly and legally called in accordance with the by-laws of the Hopkins Street Building and Loan Association, and in accordance with the Laws of the State of Wisconsin, said meeting being called by the President of said Hopkins Street Building and Loan Association, pursuant to the provisions of the by-laws of the said Hopkins Street Building and Loan Association, for the purpose of voting on the subject of said conversion, and that pursuant to the direction of the President of said Hopkins Street Building and Loan Association, a notice of the Secretary of said Hopkins Street Building and Loan Association was mailed to all the shareholders of said Association of record, at their address as shown on the books of said Association, stating the time and place of the meeting, and that the subject of conversion into a Federal Savings and Loan Association would be submitted to vote, which said notice, in words and figures, is as follows, to-wit:

"May 19th, 1934.

To Our Stockholders:

After a preliminary examination by a Federal Examiner this Association has been granted a permit to convert into a Federal Savings and Loan Association.

Now therefore you are hereby notified that a special meeting of the stockholders of the Hopkins Street Building and Loan Association will be held for the purpose of voting upon the question of making an application to convert the aforesaid association into a Federal Savings and Loan Association in accordance with the Home Owners' Loan Act of 1933 and amendments thereto, and such rules, regulations and requirements as may be prescribed by the Federal Home Loan Bank Board. All other matters incidental to

such conversion will likewise be voted upon, including authorization to the officers and directors of your Association to make said application for conversion. To further authorize your officers and directors to do any and all acts and things necessary and execute and deliver any and all documents, papers or agreements which may be necessary or requisite to effect the said conversion and all things incidental thereto.

Said meeting will be held at Schmidt's hall at 2403 West Hopkins Street, in the City and County of Milwaukee, State of Wisconsin, on Thursday, the 31st day of May, A. D. 1934, [fol. 85] at 8:00 o'clock P. M.

This question of conversion is of decided importance to our Association and our shareholders. Every shareholder should attend this meeting and inform himself or herself concerning the question and enter into the discussion. However, in order that there may be sufficient vote represented to meet the requirements of the law necessitating a representation in person or proxy of fifty-one percentum of our shareholders, we have prepared a proxy which is enclosed herewith and which it is urgent that you sign and forward to the secretary of the Association as soon as possible. In case the shares are held jointly by two parties, both should sign the proxy. Your signature or signatures should be witnessed. You understand, of course, that your presence at this meeting releases your proxy.

Your Board of Directors recommends and urges the conversion solely for the benefit of our shareholders.

Hoping that we may have the pleasure of meeting you at this most important event in our history, we are,

Very sincerely yours, Hopkins Street Bldg. & Loan Ass'n., Edw. F. Maertz, Secretary.

Telephone Kilbourn 6255."

(g) That thereafter, on to-wit, May 31st, 1934, said special meeting of the shareholders was held pursuant to notice; that there were at said time 6,949 shares of the capital stock of said association outstanding; that there were represented in person at said meeting, the owners and holders of 2761 shares; that there were represented by proxy at said meeting 3212 shares, all of which proxies were properly executed and filed in the office of the Association; that the plan of conversion, consistent with the

rules and regulations of the Federal Home Loan Bank Board was fully explained to the shareholders, and the resolution prescribed by the Federal Home Loan Bank Board, authorizing such conversion, was unanimously adopted.

(h) That thereafter, on-to-wit, May 31st, 1934, said Hopkins Street Building & Loan Association petitioned the Federal Home Loan Bank Board, on a form prescribed by said Board, for a charter as a converted Association, and on [fol. 86] June 2nd, 1934, a charter was issued by said Federal Home Loan Bank Board to said Association, as a Federal Savings and Loan Association, under the name of Hopkins Federal Savings and Loan Association.

(i) That thereafter, on to-wit, June 4th, 1934, a copy of said charter, certified by the Secretary of the Federal Home Loan Bank Board, under the seal of said Board, was filed for record in the Office of the Register of Deeds for Milwaukee County, Wisconsin, the County in which the office of said Association had been theretofore and was then located, and on June 5th, 1934 said Association notified by mail, the Banking Commissioners of the State of Wisconsin that it had converted into and had become and was a Federal Savings and Loan Association.

(j) That on June 4th, 1934, the Board of Directors of said Hopkins Federal Savings and Loan Association, held a special meeting, as its first meeting as the Board of Directors of said Association as a Federal Savings and Loan Association, and elected officers under the Federal Charter and By-Laws, authorized the transfer of shares of the institution as a Federal Association for its shares as a State Association, authorized the making of direct reduction loans, the modification (with the consent of the borrower) of existing share accumulation loans into direct reduction loans, and authorized the express assumption of its indebtedness as a State Association, authorized the printing of new cards, signs and stationery, and the transaction of future business only as a Federal Association, and said Association thereafter proceeded with the completion of its organization as a Federal Association, and has duly organized and conducted itself as such ever since.

Wherefore, your defendants respectfully pray judgment as follows:

[fol. 87] 1. Declaring said conversion by said Hopkins Street Building and Loan Association, a Wisconsin corporation, into Hopkins Federal Savings and Loan Association, a national corporation, to be lawful and valid.

2. Declaring that the Banking Commission of the State of Wisconsin has no jurisdiction over the defendants or of said Hopkins Federal Savings and Loan Association.

3. For such other and further relief as may be just and equitable in the premises.

Benjamin F. Saltzstein and Edwin J. Gross, Attorneys for Defendants. Lyman W. Sherwood, of Counsel.

Duly sworn to by Edw. F. Maertz. Jurat omitted in printing.

[fol. 88] [Endorsed:] Original. Service admitted this 28th day of September, 1934. J. E. Finnegan, Atty. Gen'l; J. E. Martin, Asst. Atty. Gen.; Benj. Poss, of Counsel, by J. P. Brazy. B. F. Saltzstein, 703 Caswell Block, Milwaukee, Wisconsin.

[File endorsement omitted.]

[fol. 89] Minute entry of argument and submission, Oct. 12, 1934, omitted in printing.

[fol. 90] In Supreme Court of Wisconsin

[Title omitted]

Request for Additional Briefs—Oct. 19, 1934

The Court requests that counsel for the parties exchange and file additional briefs, within fifteen days, upon the following questions:

(1) What if any effect upon the ability of a Wisconsin corporation to transmute itself into a federal corporation has the power reserved to the legislature by section 1 of Article XI of the constitution of the state of Wisconsin to alter or repeal general laws and special acts relating to corporations?

(2) Are the powers conferred upon building and loan associations by chapter 215, Wisconsin statutes, banking powers or privileges within the meaning of that term as used in Article XI, section 1?

[fol. 91] IN SUPREME COURT OF WISCONSIN

PETER A. CLEARY ET AL., Plaintiffs,

vs.

HOPKINS STREET BUILDING AND LOAN ASSOCIATION, a Wisconsin Corporation, et al., Defendants

Original Action—Declaratory Relief—Opinion by Justice Fairchild

JUDGMENT—Dec. 11, 1934

This cause came on to be heard on the answer to the complaint heretofore filed herein and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the writ issue as prayed for in the complaint.

[fol. 92] IN SUPREME COURT OF WISCONSIN

Nos. 212, 214, 215, August Term, 1934

STATE EX REL. PETER A. CLEARY et al., Plaintiffs,

v.

HOPKINS STREET BLDG. & LOAN ASS'N, a Wis. Corporation, et al., Defendants

RELIANCE BLDG. & LOAN ASS'N, a Corporation, Respondent,

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants

NORTHERN BLDG. & LOAN ASS'N, a Corporation, Respondent,

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants.

Appeal from two judgments of the circuit court for Milwaukee county: Charles L. Aarons, Circuit Judge. Reversed.

An original action commenced pursuant to leave granted by this court. Writ granted.

OPINION—Filed Dec. 11, 1934

The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each brought its action to restrain the banking commission and supervisor of building and loan asso- [fol. 93] ciations from interfering with the plaintiffs in their attempt to convert their association from a state building and loan association into a federal savings and loan association. On September 14, 1934, the banking commission, with leave of this court, began an original action against the Hopkins Street Bldg. & Loan Ass'n to restrain the association, its officers and agents from operating as a federal savings and loan association, to have defendant's attempted conversion into such an association declared null and void, and to compel the officers of said association to operate it as a Wisconsin building and loan association or to wind up its affairs as such an association in the manner provided by the statutes of this state, on the ground that the Hopkins Street Bldg. & Loan Ass'n is under the jurisdiction of the banking commission of the state of Wisconsin. The cases of Reliance Bldg. & Loan Ass'n and Northern Bldg. & Loan Ass'n were tried together in the circuit court for Milwaukee county before the court without a jury. The petition for leave to commence the original action in this court stands as the complaint. There was an appearance in this action by all of the named defendants and for "Hopkins Federal Savings & Loan Ass'n, a national corporation, organized pursuant to the acts of congress and the laws of the United States of America, and successor by conversion to Hopkins Street Bldg. & Loan Ass'n." An answer was interposed by the Hopkins Federal Savings & Loan Ass'n describing the proceedings taken and alleging the legality and sufficiency thereof in the matter of converting that association into a federal savings and loan association, a corporation under the government of the United States, and praying for a rule [fol. 94] that the banking commission of the state of Wisconsin has no jurisdiction of the defendant.

[fol. 95] FAIRCHILD, J.:

The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n respondents on this appeal, and the

Hopkins Street Bldg. & Loan Ass'n defendant in the original action here, are each Wisconsin corporations organized under the provisions of ch. 215, Stats. This chapter places the control and supervision of building and loan associations under the banking commission and authorizes the commission to take possession of and liquidate such an association when it shall appear that it is violating its charter or any of the laws of the state.

On July 22, 1932, congress enacted the Federal Home Loan Bank Act. By virtue of the provisions of this act, state building and loan associations were eligible to membership and, under certain conditions and restrictions, entitled to borrow from a Federal Home Loan Bank. The Wisconsin legislature, on July 10, 1933, by its enactment of sec. 215.07(8), Stats., authorized Wisconsin building and loan associations, with the approval of the commissioner of banking, to become members of and borrowers from the Federal Home Loan Bank. Each of the building and loan associations here involved became members of the Federal Home Loan Bank. On June 13, 1933, there was enacted by the congress of the United States the Home Owners' Loan Act section 5 of which authorizes the Federal Home Loan Bank Board to provide for the organization of associations to be known as Federal Savings & Loan Ass'ns and to issue charters therefor; and on April 27, 1934, by amendment to the Home Owners' Loan Act, it was provided:

"Sec. 5(i) Any member of the Federal Home Loan Bank may convert itself into a Federal Savings & Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules [fol. 96] and regulations as the board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this act."

Following the passage of the amendment just referred to and without further consent or authority of the state, application was made by the three associations to the Federal Home Loan Bank Board for permission to convert themselves into federal savings and loan associations under the

provisions of sec. 5(i) of the Home Owners' Loan Act of 1933 as amended. In each case the Federal Home Loan Bank Board granted the permission. With reference to the Hopkins Street Bldg. & Loan Ass'n the banking commission undertook to prevent the proposed conversion but in compliance with the order of the circuit court for Milwaukee county, desisted from such attempt and the association accepted a charter from the Federal Home Loan Bank Board and has since held itself out to be a savings and loan association free from the jurisdiction and control of the banking commission of this state. An original action is brought against the association seeking to have the attempted conversion declared null, void, and of no effect. The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each began an action to restrain the banking commission from interfering with its proposed conversion. In those cases the banking commission interposed counterclaims praying for declaratory relief similar to that sought in the original action in this court and an injunctional order to prevent the proposed conversion. This is briefly a description of the record in the three matters and they present identical questions. The learned judge who tried the two cases in which judgment was entered below was [fol. 97] of the opinion that congress had power to incorporate federal savings and loan associations; that the language of sec. 5(i) of the Home Owners' Loan Act of 1933 as amended April 27, 1934, did not imply the necessity of consent by the state to the proposed conversation of a state loan association into a federal loan association; and that congress had the power to authorize the conversion without the consent of the state.

The cause was first submitted upon arguments and briefs dealing to a large extent with the questions of whether congress has power to incorporate federal savings and loan associations and as to the power of congress to supersede the authority of the state over building and loan associations created by the state and to invest such corporations with corporate power to transmute themselves into federal savings and loan associations. We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the state of power over corporate charters. Since then we have again examined the questions raised. We are con-

vinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the state of Wisconsin, to convert itself into a savings and loan association under the federal act. While the other questions are well within the limits of proper discussion as outlined by the issues, it is worthy of emphasis that all other questions are incidental to this controlling question and such reference to them as may be made is in aid of the determination of the actual corporate powers of a state organized building and loan association to accomplish transmutation. This being true, we will therefore consider whether the respondents, by reason [fol. 98] of reason of provisions in their charters or the laws of their creator, have any such power.

The respondents were created by the state of Wisconsin at a time when without question the state had plenary power to create and to control the powers of these corporations. They are not banks; they have not banking powers or privileges under our state laws. Leahy v. National Bldg. & Loan Ass'n, 100 Wis. 555, 76 N. W. 625; Julien v. Model Bldg. & Investment Ass'n, 116 Wis. 79, 92 N. W. 561; First Nat. Bank v. County of Dawson, 66 Mont. 321, Pac. —; Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, So. —; Hoenig v. Huntington Nat. Bank of Columbus, 59 Fed. (2d) 479, 48 L. ed. 560; Mercantile Nat. Bank v. Hubbard, 99 Fed. 465, Ch. 215 Stats. 1933. Their charters do not authorize them to divest themselves of the corporate charter conferred upon them by the laws of the state. They have only the powers emanating from the state. These powers must be used as prescribed by the state and with due consideration for the contractual rights between the stockholders and the corporation existing by reason of state law and the charter of the corporation. Under the declared law of the state, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign state by accepting a charter from any other sovereign government. Our constitution, sec. 1, Article XI, provides:

"All general laws or special acts, enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage."

The people of our state thereby vested a reserve power over charters of corporations in the legislature. The idea that any other body or sovereign, a stranger to the contract, or that the corporation alone may deprive the state [fol. 99] of this power is foreign to the plain meaning of the language used in the constitution with relation to that subject. This provision of our constitution and similar provisions to be found in the constitutions of other states were adopted for the purpose of overcoming in part the effect of the decision of the United States Supreme Court in Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 4 L. ed. 629. In that case it was held that a corporation created by a state became a separate corporate entity and subject to control by the state to the extent only that citizens of the state were subject to control under he constitution; that any amendment, alteration or repeal of its charter which withdrew or impaired the obligations of the charter was in violation of section 10 Article I of the constitution of the United States which provides: "No state shall * * * pass any * * * law impairing the obligations of contracts."

The nature of the power expressly reserved by the Wisconsin constitutional provisions has been dealt with in many cases both in state courts and in the courts of the United States. A reference to these cases shows the extent of this power and in its proper use in controlling charters issued to corporations. In West Wisconsin R. R. Co. v. Board of Supervisors of Trempealeau Co., 35 Wis. 257, 270, referring to sec. 1, Article XI of the constitution, the court said:

"The object and historical origin of the provision in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over corporate franchises, rights and privileges which it might grant—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case."

It was also considered in another celebrated case, The [fol. 100] Attorney General v. Railroad Companies, 35 Wis. 425, 574, where the court said:

"And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule of the Dartmouth College case, as applied to corporations, never had a place in this state, never was the law here. The state emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land.

"Subject to this reserved right, and under the rule in the Dartmouth College case, charters of private corporations are contracts, * * * The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the state that the franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the state, which is their creator, durante bene placito.

"This is a question of state law, not of federal law. We give full scope to the federal constitution as interpreted by the federal courts, but we stand clearly outside of both. This question could be brought within the Dartmouth College rule, not by interpretation of the federal constitution, but by interpretation of the state constitution only. That is our function. We accept the construction of the federal constitution as the federal courts give it. But we give construction to our own constitution for ourselves. And there we might well rest."

The court pointed out that the exercise of the reserve power had been sanctioned by the federal and other state courts and cited cases.

While the federal constitution contains no power reserving to congress the right to amend, alter or modify the charters of corporations created by it, congress has in numerous instances reserved the power in the act by which corporations were created. In Union Pacific R. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496, the Supreme Court of the United States had under consideration the act of congress incorporating the Union Pacific Railroad Company, which act contained the following reservation: "Congress may at any time alter, amend or repeal this act." Considering this in connection with a former act of congress, the court said:

"We are of the opinion that congress not only retains, [fol. 101] but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in Miller v. The State, 15 Wall. 498, 21 L. ed. 104, 'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets.'"

See also Close v. Greenwood Cemetery, 107 U. S. 466, 476, L. ed. —; Tomlinson v. Jessup, 82 U. S. 454, 21 L. ed. 204.

In Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 105 N. W. 1035, a law was held unconstitutional under which a mutual insurance company attempted to convert itself into a stock company pursuant to an act of the legislature of the state of Wisconsin permitting it to do so at the option of two-thirds of its existing policy holders, representing not less than one-half of its outstanding insurance. It was sought to sustain this action of the legislature under sec. 1 of Article XI as an exercise of the power thereby reserved. It was argued that since the legislature had power to provide for the dissolution of a corporation, it might also provide for the disposition of its assets to a successor corporation. The court said:

"That right of the corporation to hold its property in harmony with that situation, and the rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the state constitution as regards the passage of laws impairing the obligations of contract, sec. 12, Art. I, Const. of Wis., and that of the national constitution as regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws. XIVth Amend. U. S. Const. . . . The act of the legislature in question, in terms or in effect,

authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members in violation of the corporate charter rights of the for-
[fol. 102] mer corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto."

The matter was further dealt with in State ex rel. Northern Pacific R. Co. v. Railroad Comm. 140 Wis. 145, 157, 121 N. W. 919. In that case the court said:

"The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall not be taken for public use without compensation. Moreover, the power to alter or amend is a reserve power in the interest of the state to modify or repeal its own contract with the corporation. Tomlinson v. Jessup, 82 U. S. 454; State v. C. & N. W. R. Co. 128 Wis. 449, 108 N. W. 594."

There can be no doubt but that it was intended by the framers of the constitution to reserve in the state the power to alter or repeal the charter of any corporation created by the legislature. The constitution having thus limited the power of the legislature, it would seem to follow that the legislature is without authority to divest itself of the power reserved to it by the constitution. But if it should be held that the legislature has such power, it is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon non consenting members of the corporation. A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder. Martin Orchard Co. v. Fruit Growers C. Co. 203 Wis. 97, 233 N. W. 603; Huber v. Martin, supra; 7 Ruling Case Law, p. 97. And there is a fundamental and material difference between being a member of a building and loan association over which the representatives chosen by the people of this state have the reserve power of control and being a member of
[fol. 103] one created by the legislative body of a different sovereign power.

Our legislature has enacted laws covering the entire subject matter of control of these associations and has molded them to the needs of the communities, regulating the manner by which they may come into existence and continue in business. Ch. 215 Stats., 1933, expressly regulates the powers conferred upon them. If it be urged that sec. 215.07 (8), Stats., reading:

"With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provision in subsection (2) of section 215.07 as to the one-year time limit and as to the amount that may be borrowed, to the contrary notwithstanding."

authorizes a building and loan association organized under the provisions of chapter 215 to divest itself of its charter as a state corporation, the answer is that sec. 215.07 (8) confers no such power nor was it intended to confer such power. Sec. 215.07(2), Stats. 1933, provides:

"To borrow money for temporary purposes, not inconsistent with the objects of the association, and issue its evidence of indebtedness therefor, but for no longer term than one year and not exceeding in the aggregate amount one-fifth of the assets on hand."

Sec. 215.07(8) is a provision authorizing building and loan associations, as to loans made from the federal home loan bank, to waive the limitation upon the power to borrow found in sec. 215.07(2). It does not attempt to deal with the power of a building and loan association to sever the ties which bind it to the state from which it derives its charter. To hold that such power was conferred by sec. 215.07(8) would be clear judicial legislation in a matter vitally important to the state involving large questions of public policy. Since respondents' charters do not provide for transmutation and no authority emanating from the [fol. 104] state of Wisconsin accords them the privilege, or attempts to confer corporate power upon them to transmute, two questions are suggested. First, has congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the state and actually to invest re-

spondents with corporate power essential to a transmutation? Second, if it be found that it was the purpose of congress by that act thus to increase respondents' corporate powers, then, has congress the power to accomplish this result? We are not treating specifically the second question for reasons already set forth.

As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the state's right to charter corporations and retain control over them under the state constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as state corporations. Nor does that act attempt to invest the state corporations with any power not granted to them by the state which created them. The act was intended to be administered in forty eight states, and applies to corporations operating under different degrees of state control and with different powers. It does not purport to invest the various state corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. If a state, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a federal corporation upon a vote of 51 per centum of the stockholders. Nor would a state statute pro- [fol. 105] viding a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the federal act may readily be interpreted as the manner of consenting by the membership which the federal government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things; first, it would enable a building and loan association to escape from regulatory control reserved by the state, and second, it would divest stockholders of their rights in the corporation under state law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion,

this would raise serious constitutional questions, for a corporate charter is not only contractual between the state and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. Huber v. Martin, supra.

Any method under which a state association seeks to transfer itself into a federal group without consideration of the contractual relation existing between it and the state would seem to be ineffective. It has only the powers emanating from the state and these must be used as prescribed by the state with due consideration for the contractual rights between stockholders and the association existing by reason of state laws and the charter of the corporation.

We will not review all the cases cited by respondents in support of the claim of right to transmutation, but our at- [fol. 106] tention is called to Casey v. Galli, 94 U. S. 673, 24 L. ed. 168, and particular emphasis is placed on the statement in the opinion: "It was as competent for congress to authorize the transmutation as to create such institutions originally." A receiver of a national bank, which by an act of congress had been converted from a state bank without an enabling act by the state, brought suit against a stockholder upon his stockholder's liability. A plea in abatement based upon the failure to obtain the consent of the state was held bad. That the quoted words were intended to be a complete statement of a rule of law to the exclusion of all qualifications may well be doubted, but even if such was the intention, we cannot recognize the result in that case as determining that the federal government may invade the jurisdiction of the state government and appropriate for its own purposes the agencies devised by the state for the welfare of its citizens or interfere against the wish of the state with respect to contracts existing between the state and corporations of its own creation. Whatever power congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to other domestic corporations organized under state law for the state's purposes in providing for the welfare of its citizens. It ought also to be said that aside from the fact that the Home Owners' Loan Act does not deal with the general subject of banking, as did the law involved in the Galli case, it is otherwise quite different from the statute there involved and

construed. That act authorized state banks to become national banks. 13 U. S. Stats. at Large, 112, 113, provided "that any bank incorporated by special law, or any banking institution organized under a general law of any state, [fol. 107] may, by authority of this act, become a national association under its provisions. * * *" It is specifically provided that "the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to charge and convert the said bank or banking institution into a national association under this act." A majority of the directors are thereafter specifically given the power to execute all necessary papers essential to a perfection of the organization as a national association. This act constituted an unmistakable investiture of corporate powers upon state banks. If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will be permitted, so far as the federal government is concerned, without purporting to increase corporate powers of state corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin, by power reserved in its constitution, has retained control over corporations organized under its laws, and since the state undoubtedly had plenary powers, both of organization and control, prior to this act, it cannot be ousted by any act of congress from these powers; that since a building and loan association is not a banking institution, the case of Casey v. Galli, [fol. 108] supra, has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders would be an impairment of the contract rights of stockholders in a Wisconsin corporation. That these are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of congress to interfere with the control of corporations organized under state

laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find.

Respondents call our attention to Ex Parte Worcester National Bank, 279 U. S. 347. From the opinion of the United States Supreme Court in that case, it appears that the Supreme Judicial Court of Massachusetts held that under the constitution and laws of that state, a state bank could change its organization to that of a federal bank without any authority given by the state to make the change. That decision rests definitely upon a determination by the Supreme Judicial Court of Massachusetts of a question of state law. We shall not attempt an analysis of the decision of the Massachusetts court. The question before us is one of state law and in answering that question we must proceed in accordance with the existing law of the state of Wisconsin.

It is our conclusion that respondents have no power to transmute, and that any purported efforts in that direction are void for want of this power. It is assumed that if the act of congress is to be given the construction contended for by respondents, it results not in the creation of a new [fol. 109] corporation but in the transfer of its allegiance by the state corporation, from the sovereignty of its creation, to the federal government. It has not been thought necessary to consider the possibility that congress, by this act, has created a new corporation, because in that event, there being no provision in the charter of the original corporation or in the laws of Wisconsin for a transfer of its property, the corporation would find itself a naked legal entity without any means of carrying out the purposes of the transfer.

By the Court—Judgments entered in the circuit court are reversed, causes remanded with directions to enter judgment in favor of the banking commission on its counterclaim. In the original action in this court, let the writ issue.

STATE OF WISCONSIN,
Milwaukee County, ss:

AFFIDAVIT OF SERVICE

Arthur A. Schumann, being first duly sworn on oath deposes and says; that he is a citizen and resident of said County of Milwaukee, Wisconsin, over 21 years of age, not related to either of the within named parties, nor in any manner interested in said case, and that at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Hopkins Street Building and Loan Association, a Wisconsin corporation, known by him to be the identical defendant corporation mentioned in said Writ of Injunction, by then and there delivering to and leaving with Edw. F. Maertz, personally, President of the aforesaid defendant corporation Hopkins Street Building and Loan Association, and whom he knows to be such person and officer a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Edw. F. Maertz, as President and Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant N. F. Remmel, as Vice President and Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defend-

ant A. J. Kitzerow, as Secretary and Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 28th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant R. J. Teske, as Treasurer and Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 28th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Ed. Kieckbusch, as Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

[fol. 111] That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Arthur J. Techel, as Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Chas. Hafemann, Jr., as Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personally, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

That at the City of Milwaukee, County and State aforesaid on the 27th day of February A. D. 1935, he served the annexed Writ of Injunction on the therein named defendant Arthur H. Fluck, as Director of the aforesaid defendant corporation Hopkins Street Building and Loan Association, personaly, known by him to be the identical defendant mentioned in said Writ of Injunction, by then and there delivering to and leaving with him personally a true copy thereof;

And at the same time exhibiting to each of them personally the original Writ of Injunction with the signature of Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, and also at the same time exhibiting to each of them personally the official seal of the Supreme Court of the State of Wisconsin;

And at the time of said services he endorsed his name and date of service on the copies so served.

Arthur A. Schumann.

Service	$5.00
Travel	1.60
	$6.60

Subscribed and sworn to before me this 1st day of March, A. D. 1935.

Bernard S. Quigley, Notary Public, Milwaukee County, Wis. (Notarial Seal.)

My commission expires May 2nd, 1937.

[fol. 112] In Supreme Court of Wisconsin

[Title omitted]

Writ of Injunction

The State of Wisconsin to the above named Defendants, and each of them, Greetings:

Whereas, this Court has determined by its decision filed herein on December 11, 1934, that the attempted conversion by the above named Hopkins Street Building and Loan Association, a Wisconsin corporation, into a federal savings and loan association is null, void and of no effect, and that

said association is subject to the jurisdiction of the Banking Commission of the State of Wisconsin as provided by the statutes of the State of Wisconsin; and whereas, the said decision orders the issuance of a writ of injunction as hereinafter set forth:

We, therefore, in consideration of the premises, strictly command that you, and each of you, operate said Hopkins Street Building and Loan Association, as a Wisconsin building and loan association, under the laws of the State of Wisconsin, and under the direction and jurisdiction of the Banking Commission of the State of Wisconsin, as pro-
[fols. 113 & 114] vided by the statutes of the said State.

We further command that you, and each of you, do absolutely refrain and desist from operating said Hopkins Street Building and Loan Association as a federal savings and loan association.

Witness, the Honorable, the Justices of the Supreme Court of the State of Wisconsin, the 19th day of December, A. D. 1934.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 115] BFS:ZS—12/18/34.

IN SUPREME COURT OF WISCONSIN

[Title omitted]

NOTICE OF MOTION FOR REHEARING—Filed Dec. 19, 1934

Please take notice that the defendants, Hopkins Street Building and Loan Association, a Wisconsin corporation, Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbush, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Street Building and Loan Association, above named, are filing with the Clerk of the above named Court, a motion for rehearing, a copy of which is hereto annexed.

Dated December 18th, 1934.

B. F. Saltzstein, E. J. Gross, Attorneys for Defendants; Lyman W. Sherwood, of Counsel.

To J. E. Finnegan, Attorney General, John E. Martin, Assistant Attorney, Benjamin Poss, Attorney for Plaintiff, Joseph P. Brazy, of Counsel.

[fol. 116] BFS:ZS—12/18/34.

IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed Dec. 19, 1934

Now come, Hopkins Street Building and Loan Association, a Wisconsin corporation, Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbush, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Street Building and Loan Association, defendants herein, by their respective undersigned attorneys of record herein, and jointly and severally move for a rehearing in the above entitled action.

Dated December 18th, 1934.

B. F. Saltzstein, E. J. Gross, Attorneys for Defendants; Lyman W. Sherwood, of Counsel.

[fol. 117] [Endorsed:] Original. Received copy Dec. 18, 1934. J. E. Finnegan, Atty. Gen.; John E. Martin, Asst. Atty. Gen., Benj. Poss, of Counsel, by Joseph P. Brazy. B. F. Saltzstein, 703 Caswell Block, Milwaukee, Wisconsin.

[File endorsement omitted.]

[fol. 118] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER STAYING PROCEEDINGS—Dec. 19, 1934

The said defendants having moved for a rehearing in this cause, it is now here ordered that all proceedings be stayed in this Court until the final determination of said motion.

[fol. 119] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—Feb. 5, 1935

The court being now sufficiently advised of and concerning the motion of the said defendants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs and costs of motion to be taxed in one case only.

[fol. 120] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER STAYING ISSUANCE OF WRIT—Feb. 6, 1935

Ordered, that upon giving of a bond of $1,000.00, to be approved by the Chief Justice, issuance of the peremptory writ of mandamus in this cause be stayed pending removal of cause to the United States Supreme Court.

[fol. 121] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 122] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed May 15, 1935

Comes now, Hopkins Federal Savings and Loan Association, a corporation organized and existing under and by virtue of the laws of the United States of America, by conversion of Hopkins Street Building and Loan Association, a Wisconsin corporation; Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed. Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Federal Savings and Loan Association, and their respective succes-

sors in office, appellants in the above entitled cause, and adopt their assignments of error as their statement of the points to be relied upon, and state that the whole of the [fols. 123 & 124] record, as filed, is necessary for the consideration of the case.

Dated May 14, 1935.

Emery J. Woodall, Attorney for Appellants; B. F. Saltzstein, E. J. Gross, Lyman W. Sherwood, of Counsel, by E. J. Woodall.

Service acknowledged this 14th day of May, A. D. 1935.

Benj. Poss, Attorney for Appellees.

[fols. 125 & 126] Service acknowledged this 9 day of May, A. D. 1935.

J. E. Finnegan, Attorney Gen., Attorney for Appellees.

[fol. 127] [File endorsement omitted.]

[fol. 128] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 3, 1935

Appeal from the Supreme Court of the State of Wisconsin.

Treating the appeal papers herein from the Supreme Court of the State of Wisconsin as an application for a writ of certiorari;

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: File No. 39,598. Wisconsin, Supreme Court. Term No. 55. Hopkins Federal Savings and Loan Association, etc., et al., Appellants, vs. Peter A. Leary, S. N. Shafer and H. F. Ibach, Constituting the Banking Commission of the Banking Department of the State of Wisconsin. Filed May 15, 1935. File No. 970; 55 O. T. 1935.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 56

RELIANCE BUILDING AND LOAN ASSOCIATION,
PETITIONER,

vs.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

PETITION FOR CERTIORARI FILED MAY 15, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 56

RELIANCE BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

RELIANCE BUILDING AND LOAN ASSOCIATION, a Corporation, Plaintiff and Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER, and H. F. IBACH, as the Banking Commission of the Banking Department of the State of Wisconsin, and CLYDE P. DIGGLES, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants and Appellees

PETITION FOR APPEAL—Filed May 1, 1935

To the Chief Justice of the Supreme Court of the State of Wisconsin:

Reliance Building and Loan Association, a corporation, your petitioner, plaintiff and appellant in the above entitled cause, shows by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision in this cause in the Supreme Court of the State of Wisconsin, the same being the highest court of the State of Wisconsin, and the decision therein being final, manifest error has occurred, greatly to the damage of your petitioners.

This case is one in which the Circuit Court of Milwaukee County of the State of Wisconsin, upon the complaint of your petitioner and other pleadings filed in this cause (No. 139,127), entered the following judgment:

"This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, circuit judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein, and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association has the right and power to convert into a federal savings and loan association, and

that the Acts of Congress so providing are valid and constitutional.

[fol. 2] (2) That the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association.

(3) That the defendants, their agents, servants and employees, be and they hereby are restrained and enjoined from taking possession of the plaintiff association or interfering in any way with the proposed conversion of the plaintiff into a federal savings and loan association.

(4) That the defendants' counterclaim be and the same hereby is dismissed on the merits."

defendants and appellees herein appealed from said judgment to the Supreme Court of the State of Wisconsin, which court reversed said judgment by its decision filed on December 11, 1934, whereupon your petitioner moved for a rehearing which was denied by final order of the Supreme Court of the State of Wisconsin entered February 5, 1935. Over objection of petitioner, duly filed, and upon remittitur, the Circuit Court entered judgment on March 9, 1935, as follows:

"This cause having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge presiding, on August 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counter-claim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin, by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1535; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given;

"On motion of J. E. Finnegan, Attorney General, Benjamin Poss and Joseph Brazy, of counsel, attorneys for the defendants,

It is ordered, adjudged and declared:

"(1) That the complaint herein be and the same hereby is dismissed upon its merits.

"(2) That the plaintiff association, its officers, directors, stockholders, agents and employees, be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

"(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin."

[fol. 3] Said judgment enjoined your petitioner from taking any other or further steps to convert itself into a federal savings and loan association notwithstanding that your petitioner was a member of the Federal Home Loan Bank of Chicago, had except as prevented by said injunction, complied with all the rules and regulations of the Federal Home Loan Bank Board pursuant to paragraph 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128,132), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646), precedent to issuance by the Federal Home Loan Bank Board, pursuant to authority vested in such Board by said Act of Congress, of a charter to your petitioner as a corporation organized and existing under and by virtue of the laws of the United States of America. Such judgment was entered also notwithstanding that paragraph (i) of Section 5 of said Act (48 Stat. 128, 134), as amended, empowered any member of a Federal Home Loan Bank to convert itself into a federal savings and loan association, and your petitioner was a member of the Federal Home Loan Bank of Chicago.

As appears from the record and proceedings in this cause and the judgment entered therein, there was drawn in question the validity of a statute of the United States, to-wit, Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by the Act of Congress

approved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress, as amended, and the decision in this cause of the Supreme Court of the State of Wisconsin, being a final decision of the highest court of said State, is against the validity of such statute of the United States. As appears from the record and proceedings in this cause and the judgment entered therein, there was specifically set up and claimed by petitioner certain titles, rights, privileges and immunities under said statute of the United States and said judgment in this cause denies such titles, rights, privileges and immunities claimed under said statute of the United States. [fol. 4] Said judgment held that your petitioner, originally organized as a Wisconsin corporation under and by virtue of the laws of the State of Wisconsin, to wit, Chapter 215 of the Wisconsin Statutes, as amended, had no power, under such statute or under Article XI, Section 1, of the Constitution of said State, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government, to-wit, the government of the United States of America, notwithstanding that under Section 2, Article VI, of the Constitution of the United States, said Act of Congress is the supreme law of the land. Such holding drew in question the validity of said statute and the Constitution of the State of Wisconsin on the ground of their being repugnant to the Constitution and laws of the United States and is in favor of their validity.

The decision of the Supreme Court of Wisconsin was made, rendered and filed on December 11, 1934; the order denying the allowance of petition for rehearing from said decision was made and entered on February 5, 1935, upon remittitur, over objection of petitioner; the Circuit Court entered judgment on March 9, 1935; the final judgment in accordance with said decision was entered by said Supreme Court on the 1st day of May, 1935, upon appeal from said judgment of the Circuit Court.

Petitioner avers that the said statute of the United States, at the time of the institution of this action, had not expired by its own limitation, and was not altered or repealed by law.

That, therefore, in accordance with Section 237(a) of the Judicial Code (U. S. C., Title 28, Sec. 344), and in accord-

ance with the Revised Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of Congress approved January 31, 1928 (45 Stat. 54), was passed, to wit, under Section 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a Writ of Error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors, filed herewith, pursuant to the Revised Rules of the Supreme Court of the United States; and there is likewise filed herewith, as required by the Revised Rules of the Supreme Court of the United States, a statement as to the jurisdiction of the Supreme Court of the United States.

[fol. 5] Wherefore, petitioner prays:

1. For the allowance of an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in order that said judgment may be examined and reversed;

2. That a transcript of the record, proceedings and papers in this cause be made and transmitted to the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Wisconsin under his hand and the seal of the Supreme Court of the State of Wisconsin, pursuant to the Revised Rules of the Supreme Court of the United States;

3. That an order be entered fixing the amount of security for costs which petitioner shall furnish;

4. That upon proper security being furnished, all execution and other proceedings in this cause in the Supreme Court of the State of Wisconsin be stayed until the final determination of this case upon this appeal to the Supreme Court of the United States.

Wallace Reiss, Attorney for Petitioner. Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fol. 6] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Reliance Building and Loan Association, a corporation, plaintiff and appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Wisconsin, on the 1st day of May, 1935, affirming a judgment entered by the Circuit Court of Milwaukee County of the State of Wisconsin on the 9th day of March, 1935, in accordance with an order directed to said Circuit Court by the Supreme Court of the State of Wisconsin, pursuant to a decision filed by said Supreme Court in said cause on the 11th day of December, 1934, and the order denying a motion for rehearing made and entered on Feb. 5, 1935, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, pursuant to the statutes of the United States and Revised Rules of the Supreme Court of the United States in such case made and provided;

[fol. 7] It is now hereby ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall, pursuant to the Revised Rules of the Supreme Court of the United States, prepare and certify under his hand and the seal of the Supreme Court of the State of Wisconsin a transcript of the record and all opinions delivered in this cause and transmit the same to the Supreme Court of the United States, so that the same shall be filed in the Supreme Court of the United States pursuant to the Revised Rules of the Supreme Court of the United States by or before the return day.

And it is further ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of One Thousand ($1,000.00) Dollars, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, and that such super-

sedeas bond, as filed and approved, shall stay all execution and other proceedings in this cause in the Supreme Court of the State of Wisconsin until the final disposition of this cause by the Supreme Court of the United States.

Dated this 1st day of May, A. D., 1935.

Marion B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal).

[fol. 8] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Reliance Building and Loan Association, a corporation, appellant herein, as required by Section 997 of the Revised Statutes (U. S. C., Title 28, Sec. 862), and in accordance with Rule 9 of the Revised Rules of the Supreme Court of the United States, assigns the following errors in the record and proceedings in the Supreme Court of the State of Wisconsin in the above entitled cause:

1. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of an order by the Circuit Court of Milwaukee County, restraining and enjoining appellant from converting into a federal savings and loan association.

2. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of the judgment by the Circuit Court of Milwaukee County, dismissing appellant's complaint upon its merits.

3. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of a judgment declaring that appellees have full power and authority to take possession of appellant association under the laws of the State of Wisconsin.

4. The Supreme Court of the State of Wisconsin erred under the pleadings in this cause in its decision in holding Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended, and more particularly paragraph (i) of Section 5 of said Act, as amended (48 Stat. 643, 646),

invalid under the Constitution of the United States of America.

5. The Supreme Court of the State of Wisconsin erred

(a) In refusing in its decision to recognize and give effect to an Act of Congress validly enacted in the execution of the powers vested in the Federal Congress by the Constitution of the United States of America, to wit, Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended.

[fol. 9] (b) In retarding, impeding, burdening and controlling the operations of said Act of Congress; and

(c) In denying titles, rights, privileges and immunities of appellant specially set up and claimed by appellant under said Act of Congress.

6. The Supreme Court of the State of Wisconsin erred in holding Chapter 215 of the Statutes of Wisconsin and Section 1 of Article IX of the Constitution of the State of Wisconsin valid as not repugnant to paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 646), or to Section 2 of Article VI of the Constitution of the United States, which provides that the laws of the United States are the supreme law of the land.

This is particularly true (a) when the Supreme Court of the State of Wisconsin in said holding construed said State statute and said section of the State Constitution as blocking the flow of power from the Congress of the United States under said Act of Congress, as amended (48 Stat. 643, 646), enabling appellant to divest itself of its State charter and to accept a charter from the sovereign government of the United States by conversion and, (b) when Wisconsin statutes, as was recognized in said decision of the Supreme Court of the State of Wisconsin,

(aa) Were silent upon the subject of conversion, and

(bb) Neither expressly prohibited conversion nor expressly empowered appellant so to convert.

7. The Supreme Court of the State of Wisconsin erred in holding that paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended

by Act of Congress approved April 27, 1934, (48 Stat. 643, 646), merely permitted Wisconsin associations to convert only if and when the legislature of the State of Wisconsin enacted legislation consenting to such conversion, but did not empower conversion of appellant without legislation of the State of Wisconsin consenting to such conversion.

PRAYER FOR REVERSAL

For which errors, appellant prays:

(1) That the decision and judgment of the Supreme [fols. 10-28] Court of the State of Wisconsin in the above entitled cause be reversed:

(2) That the writ of injunction issued be quashed and the injunction be dissolved, and

(3) That a judgment be rendered in favor of appellant, as prayed for in appellant's complaint as filed in the Circuit Court of Milwaukee County, and for costs.

Wallace Reiss, Attorney for Appellant. Emery J. Woodall, Lyman W. Sherwood, Of Counsel.

[fols. 29 & 30] Bond on Appeal for $1,000.00, approved and filed May 1, 1935, omitted in printing.

[fol. 31] [Endorsed:] Copy. State of Wisconsin. In Supreme Court. Reliance Building & Loan Ass'n, a corporation, Plaintiff, vs. Peter A. Cleary, et al., Defendants. Bond on Appeal. Filed May 1, 1935. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fols. 32-34] Citation in usual form, showing service on Peter A. Cleary, et al., filed May 1, 1935, omitted in printing.

[fol. 35] [File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 1, 1935

To the Clerk of the Supreme Court of the State of Wisconsin:

Appellant in the above entitled cause hereby indicates the portions of the record to be incorporated in the transcript thereof as follows:

1. Plaintiff's complaint in the original action in the Circuit Court of Milwaukee County of the State of Wisconsin, verified July 21, 1934.

2. Plaintiff's motion for issuance of an order to show cause and of a temporary restraining order, directed to defendants, made July 21, 1934.

3. Order to show cause of said Circuit Court, entered July 21, 1934, directed to defendants and order restraining defendants from seizing, taking possession of, or interfering in any way with plaintiff.

4. Summons in the original action, served July 21, 1934.

5. Motion by defendants to vacate said temporary restraining order and praying for an order restraining plaintiff from proceeding with conversion pending final determination of the cause, made July 27, 1934.

6. Order restraining plaintiff from proceeding further with conversion pending the final determination of the cause, entered August 14, 1934.

[fol. 36] 7. Defendants' answer and counter claim, verified July 26, 1934.

8. Stipulation by respective counsel amending answer and counter claim, dated August 22, 1934.

9. Order of said Circuit Court amending answer and counter claim, entered August 22, 1934.

10. Plaintiff's reply to counter claim, verified August 7, 1934.

11. Stipulation by respective counsel that issue had been joined, that no issues of fact had been presented, and that court may render judgment upon the merits of the cause, dated August 7, 1934.

12. Affidavit of Secretary of plaintiff Association that at a meeting of plaintiff Association a majority of the total number of shares of stock of said Association were voted in favor of conversion, dated September 12, 1934, and affidavit of Secretary as to assets and liabilities of plaintiff's corporation, Aug. 3, 1934.

13. Decision of said Circuit Court, filed September 11, 1934.

14. Order of said Circuit Court for judgment, entered September 12, 1934.

15. Judgment of said Circuit Court, entered September 12, 1934.

16. Defendants' notice of appeal, dated September 12, 1934.

17. Certificate of the Clerk of said Circuit Court, dated September 15, 1934.

18. Temporary restraining order directed to plaintiff, restraining it from taking further steps to convert itself pending final determination of the cause, entered September 12, 1934.

19. Defendants' appeal to the Supreme Court of the State of Wisconsin, dated September 12, 1934.

20. Defendants' cost and supersedeas bond on said appeal, dated —— —, ——.

21. Order approving such bond and granting supersedeas, entered —— —, ——.

22. Decision of said Supreme Court, filed December 11, 1934.

23. Plaintiff's motion for rehearing, made December 19, 1934.

24. Order of said Supreme Court denying plaintiff's motion for rehearing, entered February 5, 1935.

[fol. 37] 25. Remittitur of cause to said Circuit Court, dated March 2, 1935.

26. Order of said Supreme Court to said Circuit Court directing judgment to be entered in favor of defendants on their counter claim, entered March 2, 1935.

27. Notice to plaintiff of remittitur, dated March 7, 1935.

28. Notice to plaintiff of defendants' motion for order for judgment in accordance with said Supreme Court's order on the remittitur, dated March 7, 1935.

29. Plaintiff's objection to entry of judgment in accordance with remittitur, filed March 9, 1935, and plaintiff's objection to entry of judgment, March 9, 1935.

30. Motion of defendants for order for judgment, made March 9, 1935.

31. Judgment of said Circuit Court entered March 9, 1935, in accordance with order of said Supreme Court entered March 9, 1935.

32. Plaintiff's notice of appeal, dated March 9, 1935, from said judgment of said Circuit Court, entered March 9, 1935.

33. Stipulation of respective counsel waiving cost and supersedeas bond on such appeal, dated March 9, 1935.

34. Order of said Circuit Court approving said stipulation of counsel, entered March 9, 1935.

35. Certificate of Clerk of said Circuit Court, dated April 24, 1935.

36. Plaintiff's appeal, dated March 9, 1935, from the judgment of said Circuit Court, entered March 9, 1935.

37. Decision of said Supreme Court, filed May 1st, 1935, affirming judgment of said Circuit Court entered in favor of defendants, March 9, 1935.

38. Plaintiff's motion to said Supreme Court for a rehearing, made May 1st, 1935.

39. Order of said Supreme Court denying plaintiff's motion for rehearing, entered May 1st, 1935.

40. Plaintiff's petition for appeal to the Supreme Court of the United States, dated May 1st, 1935.

[fol. 38] 41. Plaintiff's assignment of errors and prayer for reversal, dated May 1st, 1935.

42. Plaintiff's statement of jurisdiction on appeal, dated May 1st, 1935.

43. Order of Supreme Court of State of Wisconsin allowing plaintiff's appeal, entered May 1st, 1935.

44. Plaintiff's cost and supersedeas bond, dated May 1st, 1935, approved May 1st, 1935.

45. Citation directed to defendants, bearing proof of service, dated May 1st, 1935.

46. Proof of service of appeal papers on defendants, dated May 1st, 1935.

47. Copy of this præcipe, dated May 1st, 1935.

48. Certificate of Clerk of the Supreme Court of the State of Wisconsin, dated May 1st, 1935.

Wallace Reiss, Attorney for Appellant. Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fol. 39] Copy received and service hereby admitted this 1st day of May, 1935.

James E. Finnegan, Atty. Gen., by J. E. Messerschmidt, Asst. Atty. Gen.

[fol. 40] [Caption omitted]

[fol. 41] In Circuit Court of Milwaukee County

Reliance Building & Loan Association, a Corporation, Plaintiff,

vs.

Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants

Order to Show Cause

On the verified complaint of plaintiff hereto attached, on all the records, files and proceedings in the above entitled action, and on motion of Wallace Reiss, attorney for said plaintiff,

It is ordered that said defendants, and each of them, show cause, if any they have, before the court above named, in the Calendar Branch thereof, presided over by the Hon. John C. Kleczka, Circuit Judge, in the Calendar Court Room #500, in the New Courthouse in the City of Milwaukee, Milwaukee County, Wisconsin, on the 4 day of August, 1934, at nine o'clock A. M., or as soon thereafter as counsel can be heard, why the relief as prayed for in said complaint should not be granted.

It is further ordered that pending the hearing herein and the further order of the court said defendants, and each of them, as Banking Commission and Supervisor of Building and Loan Associations of the State of Wisconsin, their employees, officers, agents and representatives, be and they hereby are temporarily enjoined and restrained from seizing, taking possession of, or in any manner interfering with [fol. 42] the property of every nature and kind of said plaintiff Association.

It is further ordered that pending the hearing herein and the further order of this court, said defendants, and each of them, as Banking Commission and the Supervisor of Building and Loan Associations of the State of Wisconsin, be, and they hereby are, enjoined and restrained from removing the officers or directors, or in any manner interfering with the officers, directors or stockholders of said plaintiff in the conduct of the regular and lawful business of said plaintiff and in the conduct of any meeting or meetings called for the purpose of considering corporate business, and more particularly the conversion of said plaintiff Association into a Federal Savings and Loan Association.

Let a copy of this order to show cause and of the verified summons and complaint attached hereto be served on said defendants, and each of them, at least 5 days before the time set for hearing herein.

Dated, Milwaukee, Wisconsin, this 21 day of July, 1934.
By the Court.

Daniel W. Sullivan, Circuit Judge.

[fol. 43] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

SUMMONS

The State of Wisconsin to the said Defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint; of which a copy is herewith served upon you.

Wallace Reiss, Attorney for Plaintiff, P. O. Address:
1218-1220 First Wisconsin National Bank Building,
735 North Water Street, Milwaukee, Milwaukee
County, Wisconsin.

[fol. 44] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

COMPLAINT

Said plaintiff, Reliance Building & Loan Association, by Wallace Reiss, its attorney, complains of said defendants and for cause of action alleges:

I

That plaintiff is and was at all times herein mentioned a mutual loan and building association, duly organized under and pursuant to Chapter 93 of the Revised Statutes of the State of Wisconsin for the year 1898 and acts amendatory thereof and supplementary thereto, with its office and principal place of business in the City of Milwaukee, Milwaukee County, Wisconsin, engaged in the business of the creation and care of a mutual savings fund from payments made to it by its members, the making of loans to its members upon real estate security situated within Milwaukee County, Wisconsin, and such other security authorized by the laws of the State of Wisconsin and the By-Laws of said Association.

II

That said defendants, Peter A. Cleary, S. N. Schafer and H. F. Ibach, are and were at all times herein mentioned the duly appointed, qualified and acting Banking Commission [fol. 45] of the Banking Department of the State of Wisconsin, and said defendant Clyde P. Diggles is and was at all times herein mentioned the duly appointed, qualified and acting Supervisor of Building and Loan Associations of said Banking Commission; that said defendants as such Banking Commission and as such Supervisor have power and authority pursuant to the statutes of said State to supervise, examine and control the affairs of building and loan associations in said State and more particularly the affairs of said plaintiff.

III

That heretofore the Congress of the United States of America enacted and the President of the United States of

America approved the Federal Home Loan Bank Act, and that pursuant thereto and in accordance therewith the Federal Home Loan Bank of Chicago, located in Evanston, Illinois, was duly organized and ever since said time has been and now is such duly organized, existing and operating bank; that subsequently, to-wit, on or about June 13, 1933, said Congress enacted and said President approved the Home Owners' Loan Act of 1933 and provided therein, among other things, for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations" and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States; that by amendment duly enacted by said Congress and approved by said President on or about April 27, 1934, said Home Owners' Loan Act of 1933 was amended, and it was provided, among other things, in Section 5 (i) as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; [fol. 46] but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

IV

That pursuant to Section 215.07, Subparagraph 8, Wisconsin Statutes, said plaintiff, on or about June 19, 1933, applied to the Banking Commission of the Banking Department of the State of Wisconsin for permission and authority to become a member of and borrow money from aforementioned Federal Home Loan Bank of Chicago; that on or about July 5, 1933, such permission and authority was duly issued to and received by said plaintiff from A. C. Kingston, Commissioner of Banking of the State of Wisconsin, by said defendant Clyde P. Diggles, as Supervisor of Building & Loan Associations of Wisconsin; that pursuant to aforementioned Federal Home Loan Bank Act and to the permission and authority so granted by said Banking

Commission of the State of Wisconsin, said plaintiff, on or about July 21, 1933, applied for membership, subscribed for forty-four (44) shares of stock in, to and of said Federal Home Loan Bank of Chicago, and on or about September 25, 1933, received from the Federal Home Loan Bank Board at Washington, D. C., its official certificate of membership of said plaintiff in said bank dated as of August 11, 1933; that said plaintiff has been ever since said last mentioned date and is now a member in good standing and a stockholder in said Federal Home Loan Bank of Chicago.

V

That heretofore, to-wit, on or about March 31, 1934, said plaintiff, in accordance with the provisions of said Home Owners' Loan Act of 1933, by its duly constituted officers and directors and by proper resolution, filed its application [fol. 47] with and made application to said Federal Home Loan Bank of Chicago for permission to convert into a Federal Savings and Loan Association; that thereupon said bank made such examination of the affairs of said plaintiff and such appraisal as might be reasonably sufficient to determine the nature, character and value of its assets and the financial condition of said plaintiff, and that on or about July 12, 1934, after such examination and appraisal, it appeared to said Federal Home Loan Bank of Chicago, that conversion of said plaintiff into a Federal Savings and Loan Association was feasible and advisable, and accordingly, on said last mentioned date, said Federal Home Loan Bank of Chicago, pursuant to said Home Owners' Loan Act of 1933 as amended April 27, 1934, granted permission to said plaintiff so to convert on a one-hundred-per-cent (100%) basis; that said permission so to convert has been at all times since said last mentioned date and now is outstanding and of full force and effect.

VI

That subsequently, to-wit, on or about July 20, 1934, said plaintiff, pursuant to said Home Owners' Loan Act of 1933 as amended, by its duly constituted Board of Directors and by proper resolution, issued and caused to be mailed to each of the stockholders of said plaintiff Association, at

their last given post office address, a thirty-day notice in writing of a special meeting of said stockholders to be held at 1925 W. National Ave., City and County of Milwaukee, Wisconsin, on the 20th day of August, 1934, for the purpose of considering, determining and voting upon the recommendation and resolution of the Board of Directors of said plaintiff Association that said plaintiff convert itself into a Federal Savings and Loan Association as aforesaid.

[fol. 48]

VII

That, as plaintiff is informed and verily believes, said defendants and each of them, during the process of conversion of a similar building and loan association of Wisconsin, to-wit, the Hopkins Street Building & Loan Association of Wisconsin, from a State to a Federal Building & Loan Association, threatened to take possession of said Association, its books, accounts, records and business, and said defendants actually seized the books and accounts of said Association and attempted to take possession of said Association and to control its affairs on or about June 5, 1934; that said defendants refused to surrender and to return to said Association aforementioned property, books, records, accounts, etc., until they were compelled to do so by order of said court.

VIII

That, as plaintiff is informed and verily believes, said defendants, and each of them, during the process of conversion similar to plaintiff's proposed conversion, from a State to a Federal Savings and Loan Association, on part of the West Lawn Building and Loan Association, located at Racine, Wisconsin, also threatened to seize and take over the business of said Association by taking possession of its office, books and records, by threatening to oust the Board of Directors, by interfering with stockholders meetings and attempting to influence stockholders meetings, and by threatening said Association that if its proposed special stockholders meeting called for June 11, 1934, were not adjourned or dismissed, said defendants would, on the morning of June 11, 1934, take over all of the property of said Association, and that said defendants, and each of them, were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with said Association and its proposed meeting and conversion.

[fol. 49] IX

That, as plaintiff is informed and verily believes, said defendants, and each of them, immediately upon receipt of information or notice of the proposed conversion by said plaintiff as aforesaid and the proposed meeting of its stockholders, intend to attempt to seize and take over the affairs, business, property and assets of said plaintiff Association, and to interfere with and prevent the proposed meeting of its stockholders, contrary to law and the statutes, and without cause, excuse or justification; that, as plaintiff is informed and verily believes, said defendants, and each of them, have threatened and will proceed to oust the officers and directors and to take possession of the business, assets and operation of each building and loan association of the State of Wisconsin which attempts or takes any steps toward converting itself into a Federal Savings and Loan Association, and more particularly the plaintiff Association, and for no other cause, purpose, reason or excuse than merely the fact of such attempted and proposed conversion.

X

That said plaintiff is not now violating and never has violated its charter, by-laws, or any law under which it operates or the direction or orders of the Banking Department or the Banking Commission or the Supervisor of Building and Loan Associations of the State of Wisconsin; that the affairs of said Association are in sound condition, its business is conducted in a safe and authorized manner, its capital is wholly unimpaired, it is now and has been at all times herein mentioned a solvent and going concern, and that there is no valid reason, cause or excuse, and no legal or equitable grounds for said defendants, or any or either of them, to take possession of said plaintiff Association; that all the assets, books of account, records and proceedings of said plaintiff association, including both real [fol. 50] and personal property, are located and are within the County of Milwaukee, State of Wisconsin, and that such proposed and threatened seizure and control by said defendants is contrary to the judgment and will of the officers, directors and stockholders of said corporation and will result in serious and irreparable damage to said plaintiff Association.

Wherefore this plaintiff demands judgment against said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations:

1. That an order be issued temporarily restraining and enjoining said defendants, and each of them, their employees, agents and representatives, from seizing, taking possession of, carrying away, keeping or retaining any of the property, books of accounts, records, or assets of said plaintiff, and from interfering with the conduct and management of the business of said plaintiff Association.

2. That said defendants, and each of them, their employees, agents and officers, be restrained and enjoined from interfering with the officers, directors or stockholders of said plaintiff Association, and with any meeting or meetings of said officers, directors or stockholders called for the purpose of considering, determining and voting upon the lawful business and affairs of said plaintiff Association, and more particularly aforementioned proposed conversion.

3. That said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations of Wisconsin, their employees, agents and representatives, be permanently restrained and enjoined from interfering with the property and lawful conduct and business of said plaintiff.

[fol. 51] 4. That plaintiff have such other and further relief as may appear just and equitable in the premises.

Wallace Reiss, Attorney for Plaintiff.

[fol. 52] *Duly sworn to by L. G. Theurer. Jurat omitted in printing.*

[fols. 53-55] Bond on injunction for $500.00—approved July 21, 1934, omitted in printing.

[fol. 56] In Circuit Court of Milwaukee County

[Title omitted]

Answer to Complaint—Filed July 21, 1934

Now come the defendants and for their answer to the complaint hereby:

I

Admit the allegations contained in paragraphs designated "I", "II", "III", "IV" and "VII" of the complaint.

II

Admit upon information and belief the allegations contained in paragraphs designated "V" and "VI" of the complaint.

III

Deny all of the allegations contained in paragraph designated "VIII" of the complaint except that the said defendants were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with said association and its proposed meeting and conversion.

IV

With reference to the allegations contained in paragraph designated "IX" of the complaint, allege that the first information or notice of the proposed conversion by the [fol. 57] plaintiff was received by the defendant upon the service of the summons and complaint in this action, and prior to the service of said summons and complaint the defendants had no information or notice of any kind whatsoever of said proposed conversion; allege that the defendants have made no attempt to seize and take over the affairs, business property or assets of the plaintiff; allege that the defendants have made no attempt to interfere with or prevent the proposed meeting of the plaintiff's stockholders; deny that the defendants have threatened to oust the officers and directors and to take possession of the business, assets and operation of the building and loan associations of the State of Wisconsin which attempt to or take any steps toward conversion into a federal savings and loan association; deny that the defendants have made any threats with reference to the plaintiff association.

V

With reference to the allegations contained in paragraph designated "X" of the complaint, allege that the attempted conversion by the said plaintiff association as set forth in the complaint was and is a violation of its charter, by-laws,

and the laws of the State of Wisconsin; allege that under the laws of the State of Wisconsin the Banking Commission is authorized to take possession of the property and business of any building and loan association organized under the laws of the State of Wisconsin which has violated its charter or the laws of this State; deny that the taking over of possession of the plaintiff by the defendants will result in any damage to the plaintiff association.

VI

As a separate defense to this action, the defendants allege upon information and belief that under and pursuant [fol. 58] to the provisions of Sec. 215.33 (10) of the Wisconsin Statutes the Circuit Court of Milwaukee County has no right or power to entertain the alleged cause of action contained in plaintiff's complaint, and that the plaintiff's sole remedy in the event that the property and business of the plaintiff is taken over by the Banking Commission, if it deem itself aggrieved thereby, is to apply to the Credit Court of Dane County to enjoin further proceedings by said Banking Commission.

Further answering the complaint herein and by way of counterclaim, the defendants allege as follows:

I

The plaintiff is a building and loan association organized and existing under and by virtue of the laws of the State of Wisconsin with its principal office and place of business in the City and County of Milwaukee, Wisconsin.

II

The defendants Peter A. Cleary, S. N. Schafer, and H. F. Ibach are the duly appointed, qualified and acting banking commissioners of the Banking Department of the State of Wisconsin; the defendant Clyde P. Diggles is the duly appointed, qualified and acting building and loan supervisor employed by the Banking Commission of the State of Wisconsin.

III

Pursuant to the provisions of Chapter 215 of the Wisconsin Statutes, said Banking Commission is vested with

the control and supervision of all building and loan associations organized under the laws of the State of Wisconsin or other similar laws, or authorized to transact business in the State of Wisconsin; pursuant to the provisions of Sec. [fol. 59] 215.33 of the Wisconsin Statutes said Banking Commission is given full power to take possession and liquidate a building and loan association when it shall appear, among other things, that said building and loan association has violated its charter or any of the laws of the State of Wisconsin.

IV

On or about March 31, 1934, the plaintiff through its officers and directors made application, without the consent or authority of the Banking Commission of the State of Wisconsin, to the Federal Home Loan Bank Board for permission to convert itself into a federal savings and loan association under the provisions of Section 5 (1) of the Home Owners' Loan Act of 1933 as amended by the Seventy-third Congress on April 27, 1934. Thereafter, as defendants are informed and believe, the said Federal Home Loan Bank Board granted said permission to said plaintiff association.

V

Subsequently, to-wit, on or about July 20, 1934, the said plaintiff, as defendants are informal and believe, mailed to each of its stockholders a notice in writing of a special meeting of said stockholders to be held August 20, 1934, for the purpose of voting upon a recommendation and a resolution of the Board of Directors of said plaintiff association that said plaintiff convert itself into a federal savings and loan association.

VI

As defendants are informed and believe, the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; [fol. 59a] that any acts of Congress or rules and regulations of the Federal Home Loan Bank Board which purport to authorize said conversion without the consent of and in violation of the laws of the State of Wisconsin are void and of no effect and in violation of the Constitution of the United

States of America and the Constitution of the State of Wisconsin; that Congress has no right or power under the Constitution of the United States of America to authorize the conversion of a State building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without State legislation consenting to such conversion.

VII

As defendants are informed and believe, the plaintiff association will unlawfully convert itself into a federal savings and loan association unless restrained by this Court from taking any further steps in said attempted conversion; that said plaintiff proposes and intends to accept a charter from the Federal Home Loan Bank Board and to discontinue doing business as a Wisconsin building and loan association under the jurisdiction of the Banking Commission, that the plaintiff intends to transfer all of its assets to said proposed federal association and to issue to its members stock certificates in said federal association in lieu of stock certificates issued by the plaintiff, all in violation of the laws of the State of Wisconsin and the orders of the Banking Commission of the State of Wisconsin.

Wherefore, the defendants pray judgment against the plaintiff as follows:

(1) Dismissing the complaint of the plaintiff herein upon its merits.

(2) Declaring that the defendants have full power and authority to take possession of the plaintiff association un- [fol. 60] der the laws of the State of Wisconsin.

(3) Restraining and enjoining the plaintiff association, its officers, directors, stockholders, agents and employees, from taking any other or further steps in said attempted conversion by said plaintiff into a federal savings and loan association.

(4) And for such other and further relief as may be just and equitable and for the defendants' costs and disbursements in this action.

J. E. Finnegan, Attorney General; John E. Martin, Assistant Attorney General; Benjamin Poss, of Counsel, Attorneys for the Defendants.

Duly sworn to by Peter A. Cleary. Jurat omitted in printing.

[fol. 61] [File endorsement omitted.]

[fol. 62] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

STIPULATION AND ORDER AMENDING ANSWER

It is hereby stipulated and agreed by and between the parties to the above entitled action through their respective counsel that defendants may amend their answer and counterclaim in the following manner:

(a) By striking paragraph designated "VI" of the defendants' answer.

(b) By amending paragraph designated "VI" of the defendants' counterclaim so as to read as follows:

"VI"

"Defendants are informed and believe that the United States of America has no right or power to create federal savings and loan associations; that the provisions of Sec. 5 of the Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of such federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such associations; that the creation of such associations is wholly outside the powers vested in Congress by Sec. 8 of Article I of the Constitution, or any other provision of the Constitution of the United States, and is in direct violation of Article X [fol. 63] of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority, 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor' is an unconsti-

tutional delegation of legislative power by the Congress of the United States, in violation of Sec. 1 of Article I of the Constitution of the United States; that the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a State building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without State consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the United States, or any other provision of the Federal Constitution, and is in violation of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) deny to all stockholders of the plaintiff association who do not desire the association to convert the equal protection of the laws and deprive them of property without due process of law, in violation of Sec. 1 of Article XIV [fol. 64] of the Amendments to the Constitution of the United States."

Wallace Reiss, Attorney for Plaintiff. James E. Finnegan, Atty. Gen.; J. E. Marten, Ass't Secy. Gen.; Benjamin Poss, of Counsel, by J. P. Brazy, Attorneys for Defendants.

Upon the foregoing stipulation, it is ordered:

(a) That paragraph designated "VI" of the defendants' answer be and the same is hereby stricken.

(b) That paragraph designated "VI" of the defendants' counterclaim be and hereby is amended so as to read:

"VI"

"Defendants are informed and believe that the United States of America has no right or power to create federal

savings and loan associations; that the provisions of Sec. 5 of the Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of such federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such associations; that the creation of such associations is wholly outside the powers vested in Congress by Sec. 8 of Article I of the Constitution, or any other provision of the Constitution of the United States, and is in direct violation of Article X of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority, 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associa- [fols. 65 & 66] tions to be known as "Federal Savings and Loan Associations", and to issue charters therefor' is an unconstitutional delegation of legislative power by the Congress of the United States, in violation of Sec. I of Article I of the Constitution of the United States; that the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a State building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without State consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the United States, or any other provision of the Federal Constitution, and is in violation of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) deny to all stockholders of the

plaintiff association who do not desire the association to convert the equal protection of the laws and deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States."

By the Court.

Chas. L. Aarons, Circuit Judge.

Dated August 22, 1934.

[fol. 67] In Circuit Court of Milwaukee County

[Title omitted]

Reply to Counterclaim—Filed Sept. 11, 1934

Said plaintiff, by Wallace Reiss, its attorney, replies to the counterclaim of said defendants as follows:

First. It admits the allegations contained in paragraphs denominated 1, 2, 3, and 5 of said counterclaim.

Second. It admits the allegations contained in paragraph denomiated 4 of said counterclaim; it alleges that the consent or authority of the Banking Commission of the State of Wisconsin to make an application to the Federal Home Loan Bank Board for permission to convert into a Federal Savings and Loan Association was not necessary or required, and that said Banking Commission had and has no power or authority in law over such application and conversion.

Third. It denies the allegations contained in paragraph denominated 6 of said counterclaim.

Fourth. It denies that plaintiff will unlawfully convert itself into a Federal Savings and Loan Association or that such — conversion is in violation of the laws of the State of Wisconsin or the orders of the Banking Commission of the State of Wisconsin. It alleges that it has never received any order from said Banking Commission to cease or desist from said conversion.

[fol. 68] Wherefore plaintiff demands judgment that defendants' counterclaim be dismissed with costs and for such further relief as may be just and equitable.

Wallace Reiss, Attorney for Plaintiff.

[fol. 69] *Duly sworn to by A. G. Pflugradt. Jurat omitted in printing.*

[fol. 70] Received copy August 7, 1934. Benj. Poss, Special Counsel for Defts.

[File endorsement omitted.]

[fol. 71] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF MOTION FOR RESTRAINING ORDER, ETC.—Filed July 31, 1934

Please take notice that upon the verified answer and counterclaim of the defendants herein, the defendants will move this Court on the 4th day of August, 1934, before the Calendar Branch thereof, at the Court House in the City and County of Milwaukee, Wisconsin, at 9:00 o'clock A. M., or as soon thereafter as counsel can be heard, for an order restraining and enjoining the plaintiff, its officers, directors, stockholders, agents and employes, pending the final determination of this action, from taking any other or further steps in its attempt to convert into a federal savings and loan association.

Dated July 27th, 1934.

J. E. Finnegan, Attorney General; John E. Martin, Ass't Atty. Gen.; Benjamin Poss, of Counsel, Attorneys for the Defendants.

To Wallace Reiss, Esq., Attorney for Plaintiff.

[fol. 72] Received copy July 27, 1934. Wallace Reiss, Plaintiff's Atty.

[File endorsement omitted.]

[fol. 73] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

STIPULATION AS TO HEARING, ETC.—Filed Sept. 12, 1934

It is hereby stipulated by and between the parties to this action through their respective counsel that issue in this

action on plaintiff's complaint, defendants' answer and counterclaim and amended answer and counterclaim, and plaintiff's reply thereto, has been joined; that no issue of fact is presented and that upon the hearing held in Court on August 7th, 1934, the Court may render judgment upon the merits of this cause as contained in the pleadings on file herein and without the taking of any testimony.

Dated August 7th, 1934.

Wallace Reiss, Attorney for Plaintiff. J. E. Finnegan, Atty. Gen.; John E. Martin, Ass't Atty. Gen.; Benjamin Poss, of Counsel, by J. P. Brazy, Attorneys for Defendants.

[fol. 74] [File endorsement omitted.]

[fol. 75] In Circuit Court of Milwaukee County

[Title omitted]

Affidavit of A. G. Pflugradt—Filed Aug. 7, 1934

State of Wisconsin,
Milwaukee County, ss:

A. G. Pflugradt, being first duly sworn, on oath says that he is and was at all times herein mentioned an officer, to-wit, Secretary of said plaintiff, Reliance Building & Loan Association, a building and loan association incorporated under the laws of the State of Wisconsin; that as such officer he has and had at all times herein mentioned charge of the books, accounts, office, etc., of said Association; that there is attached hereto and made part hereof a statement of assets and liabilities of said Association as of June 30, 1934; that said statement is a true and correct statement of the accounts therein set forth and of the books of account and condition of said Association as of said day.

A. G. Pflugradt.

Subscribed and sworn to before me this 3 day of August, 1934.

Wallace Reiss, Notary Public, Milwaukee County, Wisconsin.

[fol. 76] Installment Stock for Savings
Paid Up Stock for Investments
Authorized Capital $5,000,000.00

Reliance Building and Loan Association
2536 W. National Avenue, Milwaukee, Wisconsin
Statement of Assets and Liabilities as of June 30, 1934

Assets

Mortgage Loans	423,082.00
Stock Loans	29,527.07
Land Contracts	24,965.69
Taxes Adv. for Bor.	14,493.50
Insurance Adv. for Bor.	1,318.47
Other Advances	699.35
Judgments	98,424.27
Real Estate	198,144.02
H. O. L. C. Bonds	27,225.00
Baby Bonds	292.00
Federal Home Loan Bank stock	4,400.00
Furniture and Fixtures	304.95
Cash on hand and in bank	4,835.10
Notes Receivable	19.25
	827,730.67

Liabilities

Pledged Instal. St. Dues	84,532.04
" " " Div.	16,709.82
Unpledged Instal. St. Dues	140,499.91
" " " "	36,080.77
	277,822.54
Paid-up Stock	491,500.00
Cash over	12.25
Incomplete Loans	14,281.86
Notes Payable	400.00
Collected on Receiverships	765.54
Reserve for painting H. O. L. C. buildings	195.67
Reserve for 1934 taxes	5,701.75
Special Reserve for losses	17,051.06
Contingent Fund	20,000.00
[fol. 77] [File endorsement omitted]	827,730.67

[fol. 78] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT OF A. G. PFLUGRADT—Filed Sept. 14, 1934

STATE OF WISCONSIN,
Milwaukee County, ss:

A. G. Pflugradt, being first duly sworn, on oath says that he is and was at all times herein mentioned Secretary of said plaintiff, Reliance Building & Loan Association, and makes this affidavit for and in behalf of said Association, being thereto duly authorized; that as such Secretary he has and had, at all times herein mentioned, charge of the books, accounts, records, etc., of said plaintiff Association, and more particularly the records of outstanding shares of stock, proxies, and attendance, more particularly as respecting the meeting of said Association held August 20, 1934, for the purpose of voting to convert said Association into a Federal Savings and Loan Association; that there were outstanding at the time of said meeting, to-wit, August 20, 1934, a total of 10,885 shares of stock; that of said total number of shares so outstanding there were present in person at said meeting stockholders owning 3,049 shares and stockholders holding written proxies for 4,303 shares, or a total present at said meeting of 7,352 shares of stock; that a resolution was duly offered at said meeting of said plain-
[fol. 79] tiff Association August 20, 1934, called particularly for the purpose herein stated, to-wit, to pass upon the conversion of said Association from a State to a Federal Building and Loan Association; that upon the motion duly made and seconded to adopt said resolution for such conversion, 7,286 shares of stock of said plaintiff Association voted in favor of the adoption of said resolution and 66 shares of stock voted against such adoption; that said 66 shares so voted against said adoption were all voted by one stockholder who held and owned 36 of said shares so voted by him in person and held a proxy from and of the owner of the remaining 30 shares so voted by him.

A. G. Pflugradt.

Subscribed and sworn to before me this 12 day of September, 1934

Wallace Reiss, Notary Public, Milwaukee County, Wisconsin.

[fol. 80] [File endorsement omitted.]

[fol. 81] IN CIRCUIT COURT OF MILWAUKEE, BRANCH EIGHT

#139,127

RELIANCE BUILDING & LOAN ASSOCIATION, Plaintiff,

versus

PETER A. CLEARY et al., Defendants

#139,128

NORTHERN BUILDING & LOAN ASSOCIATION, Plaintiff,

versus

PETER A. CLEARY et al., Defendants

DECISION—Filed Sept. 11, 1934

The two plaintiff Associations seek to convert themselves into Federal Savings & Loan Associations pursuant to Section 5 (i) of the Act of Congress known as the Home Owners' Loan Act of 1933 as amended. They brought these actions to restrain the defendants (who are members of the Banking Commission and Supervisor of Building and Loan Associations of Wisconsin) from interfering with such proposed conversion.

Arguments and briefs have been submitted upon motions made by each side to restrain the other.

The questions involved will be stated in the headings and will be dealt with in this opinion.

[fol. 82] I

Does the language of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, imply necessity of legal con-

sent by the State to the proposed conversion of State building and loan associations into Federal savings and loan associations?

This question is presented initially because, if answered in the affirmative, consideration of the constitutionality of the Act becomes unnecessary.

Sec. 5 (i), as amended in 1934, provides:

"Any member of the Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a *legal meeting* called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

This is an amendment of the section as it was originally enacted in which the pertinent language used was "upon a vote of its stockholders as provided by the law under which it operates". The rules and regulations adopted by the Federal Home Loan Bank Board for Federal savings and loan associations were enacted prior to the 1934 amendment of the statute. In those rules it was provided that "conversion will not be approved until a vote is obtained which • • • is a vote which under the State law authorizes conversion." The amendment of the Act of Congress on the specific subject of the vote required indiciates an intention to effectuate the conversion regardless of any provision of a State law on the subject. The rules, of course, are [fol. 83] superseded by the subsequent amendment of the Act. The term "legal meeting" cannot, in view of the context — as just referred to — be said to imply consent of the State to a proposed conversion. Those words can have reference only to the legal requirements precedent to calling and holding a meeting. Although the consent of the State to the proposed conversion be not obtained, the *meeting* itself is not illegal if called and held pursuant to the laws or rules governing the procedure of holding a meeting. Since the question (in the heading) must therefore be answered negatively, it becomes necessary to consider the

validity of the Act of Congress authorizing the incorporation of "Federal savings and loan associations", and particularly, the conversion of State associations into Federal associations. (Secs. 5 (a) and 5 (i) of Home Owners' Loan Act of 1933 as amended.)

II

Has Congress the power to incorporate savings and loan associations?

It is conclusively established by the highest judicial authority that Congress possesses the power to incorporate banks to provide means deemed appropriate by Congress to carry out the sovereign powers enumerated in Article I, Section 8, of the United States Constitution. The Supreme Court of the United States has affirmed this power with respect to the establishment of the National Bank of the United States in the early part of the last century, the establishment of a national banking system after the Civil War, and the more recent establishment of Federal Land Banks and Joint Stock Land Banks. McCulloch v. Maryland, 4 Wheat. [fol. 84] 316, 4 L. Ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204; Farmers & Merchants Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L. Ed. 577.

The power of Congress is held to extend not merely to the establishment of the bank, and the granting to it of authority to serve governmental purposes, but the granting of such additional functions as are appropriate and relevant to a successful banking business, even though they are of a private nature, and considered isolatedly, are not within the implied power of Congress. Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204; First National Bank v. Fellows, 244 U. S. 416, 61 L. Ed. 1233, 1237; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L. Ed. 577, 589.

A principal consideration upon which Chief Justice Marshall rested the authority to create the bank was the fact that its formation was required by the fiscal operations of the government. Id., p. 589.

The title of the Home Owners' Loan Act of 1933 includes, among other language, the words, "to increase the market for obligations of the United States." The provisions for the Federal savings and loan associations are contained in

Sec. 5 of the Act. Sec. 5 (k) permits such associations to be employed as fiscal agents of the Government. But neither the title nor any express designation of purpose is all inclusive. The purpose of this Act, as well as the Federal Home Loan Bank Act of July 22, 1932, and the Federal Land Bank Act, is apparent throughout their content, and from the debates in public committee hearings [fol. 85] and in Congress. The ultimate purpose of these acts is fundamentally the same—the rehabilitation of the people of an entire nation suffering from the most calamitous burden of debt, contraction of credit and economic and financial depression known in American history. Congress, by its expressions, apparently believed that government-supervised institutions, making long time loans on homes and receiving savings in exchange for the issue of income shares of stock, can be useful in increasing the market for government obligations and in being employed as fiscal agents for the government—even though its ultimate purpose was to stimulate a return of wholesome economic conditions. If the act carries out a legitimate end within the scope of the Constitution by appropriate means, the motives of Congress cannot be questions-. Smith v. Kansas City Title & Trust Co., 65 L. Ed. p. 589. Congress having found it necessary to create this fiscal agency, and the power existing to do that, the extent of the actual exercise of the authority granted does not operate to restrict or impair the power. Id., p. 589.

It is said by defendants' counsel that Congress went too far; that the same motive logically would lead to the control by the government of every conceivable business institution because of the relation of the latter to the banks. As stated by Marshall: "All must admit that the powers of the government are limited, and that its limits are not to be transcended." McCulloch v. Maryland, 4 L. Ed. p. 605. Whatever may be said against the extension of the power to the field suggested, yet in view of the character of savings and loan associations, and their universal use as a reservoir for the money savings of the people, it can [fol. 86] not be said to be clear that the Congress has in this instance transcended the limits of its powers granted in the Constitution.

The Home Owners' Loan Act, in which the Federal savings and loan associations are created, is but the sequel

of its predecessors. It is the complement of the Home Loan Bank Act of 1932. It is a link in the chain of consistent legislation.

Summarizing Chief Justice Marshall's opinion in McCulloch v. Maryland, Chief Justice White, in First National Bank v. Fellows, 244 U. S. 416, 61 L. Ed. 1233, says: "In terms it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for." Id., 1237.

When one considers the breadth of the scope of Congressional power as disclosed by the facts and the decision in Smith v. Kansas City T. & T. Co., 255 U. S. 180, 65 L. Ed. 577, pertaining to the creation of Federal Land Banks and Joint Stock Land Banks, dealing with long time agricultural loans, it cannot be said that the present statute is plainly unconstitutional. It was said in that decision: "A bank is a moneyed institution to facilitate the borrowing, landing and caring for money. But whether technically banks or not, these organizations may serve the governmental purposes declared by Congress in their creation." Id. (65 L. Ed.) 589, 590.

[fol. 87] In the light of the decisions cited it cannot be said that there is more than a fair doubt as to the asserted power of Congress extending to the creation of Federal savings and loan associations. "The question whether a law be void for its repugnancy to the Constitution is at all times a question of such delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." Dartmouth College v. Woodward, 4 Wheat, 418, 4 L. Ed. pp. 651-652. Many courts, including our own Supreme Court, have said that a statute must be presumed to be constitutional unless its repugnancy to the Constitution appears "beyond a reasonable doubt." 6 R. C. L., p. 99; R. C. L. Perm. Supp., "Const. Law" 98; Lawrence University v. Outagamie County, 150 Wis. 244, 246; Peterson v. Widule, 157 Wis. 641, 647; State ex rel. Carnation M. P. Co. v. Emery, 178 Wis. 146, 151; State ex rel. Blockwitz v. Diehl, 198 Wis. 326, 331; Blaisdell v. Home Building & Loan Association, 86 A. L. R. 1507, 1513.

III

Has Congress the power to authorize the conversion of State building and loan associations into Federal savings and loan associations without consent of the State?

Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, was an action commenced by a receiver to enforce the liability of a stockholder of the Bank of New Orleans, a Louisiana banking corporation, which had converted itself into the New Orleans National Banking Association pursuant to the Banking Act of Congress of June 3, 1864. The defendant filed three pleas in abatement and the second of which was to the effect that the Bank of New Orleans had no power [fol. 88] by its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States. The court said:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the 44th Section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally." Id. (24 L. Ed.) p. 169.

The doctrine thus announced has never been overruled. It is referred to with apparent approval in Ex parte Worcester County National Bank, 279 U. S. 347, 73 L. Ed. 733, 737.

By virtue of that authority it must therefore be held that there is no necessity for a State enabling act in order that building and loan associations organized under Wisconsin Statutes may convert themselves into Federal savings and loan associations.

IV

Manner of Exercise of Act of Conversion

So long as the doctrine of Casey v. Galli (supra) stands unmodified by the Supreme Court of the United States it cannot be held here that the voluntary conversion of a State

association into a Federal association, created by Congress in the exercise of a power within the scope of the Federal Constitution, infringes upon the just authority of the State, even though the State withholds its consent.

[fol. 89] But while the consent of the State is not necessary under the rule of the Casey case, the conversion by the State association can be effectuated only by its voluntary action. That can be achieved by an expression of the will of the State association in the only manner possible for it to do so; that is, it must be governed by the provisions of its charter or the State law applicable to its method of expressing its will. Congress may employ State corporations with their consent as instrumentalities of the United States. Westfall v. U. S. 274 U. S. 256, 71 L. Ed. 1036, 1037. A provision in an act of Congress by which a smaller percentage of stock in a State corporation is fixed to procure corporate action than the percentage required by the charter of such association could not be sustained, for the consent of the State association would not thus be obtained. Commonwealth v. First Nat. Bank & Trust Co., 154 Atl. (Pa.) 379, 380, holding that only by obedience to the prescriptions of the statute of the State can a corporation called into being by the State be dissolved. Compare Fed. Land Bank v. Crookston T. Co., (Minn.) 230 N. W. 797; Northern Sec. Co. v. U. S., 193 U. S. 197, 48 L. Ed. 679, 704.

Is the conversion requirement of 51% of the votes cast at a legal meeting contained in Sec. 5 (i) of the Home Owners' Loan Act in conflict with any provision of the Wisconsin Statutes?

Sec. 181.03 of Wis. Stats. provides for dissolution of domestic corporation by a vote of two-thirds of the stock. Sec. 215.36 (1) (as amended Feb. 8, 1932) provides for liquidation or dissolution of building and loan associations by a two-thirds vote of all its outstanding authorized capital [fol. 90] stock. Sec. 215.335 provides that any building and loan association may absorb any other association located in the same county. It also provides that when two associations propose to consolidate, they must have the approval of the Commissioner of Banking and a majority vote of the board of directors of each such association, and that such proposed consolidation shall be ratified and confirmed

by the affirmative vote of the shareholders of each such association owning at least two-thirds of its shares outstanding.

If any of these provisions are applicable to conversion into Federal Savings and Loan Associations under the Home Owners' Loan Act, then such applicable provision could not be validly overridden by the Act of Congress.

In the opinion of the writer the mentioned statutory provisions of Wisconsin are not so applicable. Those provisions do not relate to conversion into Federal associations. As to that the Wisconsin statutes are silent. It may be noted, for comparative purposes, that a Wisconsin statute provides for the reorganization of a State bank as a national bank. No provision as to the vote required is contained in that statute. Sec. 221.21. Hence the Federal statute, as to the vote required, would apply. Since the State's consent to conversion is not necessary, the conversion of a State building and loan association may be effected by the 51% vote fixed by Sec. 5 (i) of the Home Owners' Loan Act, unless it can be said that such conversion into a Federal association works a dissolution of and extinguishes the corporate identity of the State association. It appears, however, to be well established that the reorganization of a State bank as a national bank does not destroy its identity or corporate existence. Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. Ed. 841, 843; Michigan Ins. Bank [fol. 91] v. Eldred, 143 U. S. 293, 36 L. Ed. 162, 164; Commonwealth v. First Nat. Bank & T. Co., 154 Atl. (Pa.) 379, 381 ("the conversion • • • is merely a change of title and governmental supervision"); 3 Ruling Case Law 658, "Banks' 288); 15 A. L. R. 1133, note.

While it is thus here concluded that no statute of this State is contravened by the provision in Sec. 5 (i) of the Home Owners' Loan Act as to the vote required for conversion, yet if it were otherwise—that is, if a two-thirds vote of all outstanding shares was required—the actual vote disclosed that more than two-thirds of such shares has in the case of each of the plaintiff associations been case in favor of conversion, as the court has been informed. These votes were taken, with the court's permission, since the hearing of the motions herein, the validity of the action taken being dependent upon the decision herein. Verified statements of

the proceedings had wherein such votes were taken may be filed as parts of the record herein.

Conclusions

The arguments and briefs of counsel have been very thorough and helpful to the court. By way of a single exception, however, it may not be amiss to add that arguments of a political nature indulged in in the last portion of the main brief of plaintiffs' counsel are inept. So also are the assertions of such counsel that in order for a court to declare a law invalid it must find that the work of the lawmakers was "insincere, frivolous and childish." If that were true, then it would have to be admitted that the Supreme Court of the United States has on many occasions so designated the acts of Congress. Most earnest and [fol. 92] sincere Congressmen have frequently enacted unconstitutional measures. The questions in this case are close and have given the court great concern. It would be well to bear in mind the words of the great Marshall in writing of the division in President Washington's Cabinet respecting the power of Congress to create the first national bank of the United States:

"The liberal mind which can review them [the arguments] without prejudice will charge neither the supporters nor the opponents of the bill with insincerity, nor with being actuated by motives which might not have been avowed."

(Marshall's Life of Washington, Vol. IV, p. 396.)

The plaintiffs' motions for a restraining order, to prevent the defendants from interfering with the proposed conversion, are granted. The defendants' motions to prevent the plaintiffs from taking further steps to convert their associations into Federal Savings and Loan Associations are denied.

Chas. L. Aarons, Circuit Judge.

Dated Sept. 11th, 1934.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ORDER FOR JUDGMENT—Filed Sept. 12, 1934

On the 21st day of July, 1934, plaintiff obtained an order from this Court directing the defendants to show cause before this Court on August 4, 1934, why the relief prayed for in plaintiff's complaint on file herein should not be granted. Said order to show cause also contained an ex parte order restraining the defendants from taking possession of the assets of the plaintiff and from interfering with the officers, directors and stockholders of the plaintiff in the conduct of any meeting or meetings called for the purpose of considering corporate business and more particularly the conversion of said plaintiff into a federal savings and loan association.

On July 27, 1934, the defendants served a notice on the plaintiff stating that on said August 4, 1934, defendants would move for an order restraining and enjoining the plaintiffs, its officers, directors, stockholders, agents and employes, pending the final determination of this action, from taking any other or further steps in its attempt to convert into a federal savings and loan association.

The plaintiff's order to show cause and the defendants' [fol. 95] motion came on to be heard on August 7, 1934. There being no issues of fact in the action, the parties through their respective counsel stipulated in open court at the said hearing with the consent of the Court that said hearing be the trial of the action and that the Court enter judgment upon the merits of the cause without the taking of testimony herein.

After hearing the arguments of counsel and being fully advised in the premises and pursuant to the written decision on file herein,

It is ordered that judgment be entered as follows:

1. Declaring that the plaintiff association has the right and power to convert into a federal savings and loan association, and that the Acts of Congress so providing are valid and constitutional.

2. Declaring that the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association.

3. Restraining and enjoining the defendants, their agents, servants and employees from taking possession of the plaintiff association or interfering in any way with the proposed conversion of the plaintiff into a federal savings and loan association.

4. Dismissing the defendant's counterclaim on the merits.

Dated this 12th day of September, 1934.

By the Court.

Charles L. Aarons, Circuit Judge.

[fol. 96] [File endorsement omitted.]

[fol. 97] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

RELIANCE BUILDING & LOAN ASSOCIATION, a Corporation, Plaintiff,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH as the Banking Commission of the Banking Department of the State of Wisconsin, and CLYDE P. DIGGLES, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants

JUDGMENT—Filed Sept. 12, 1934

This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, circuit judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein, and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association has the right and power to convert into a federal savings and loan association, and that the Acts of Congress so providing are valid and constitutional.

(2) That the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association;

(3) That the defendants, their agents, servants and employees be and they hereby are restrained and enjoined from taking possession of the plaintiff association or interfering in any way with the proposed conversion of the plaintiff into a federal savings and loan association.

(4) That the defendants' counterclaim be and the same hereby is dismissed on the merits.

Dated this 12th day of September, A. D. 1934,
By the Court.
Jas. L. McCormack, Clerk, By Harold H. Gruettner, Deputy Clerk

[fol. 98] [File endorsement omitted.]

[fol. 99] [File endorsement omitted.]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

NOTICE OF APPEAL—Filed Sept. 12, 1934

Please take notice that Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, the defendants in this action, hereby appeal to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this action in the Circuit Court for the County of Milwaukee on the 12th day of September, A. D. 1934, in favor of the plaintiff and against the defendants, and from the whole of said judgment. A copy of said judgment is hereto annexed.

Dated September 12, A. D. 1934.
J. E. Finnegan, Attorney General, John E. Martin, Asst. Attorney General, Attorneys for Defendants.
Benjamin Poss, Joseph P. Brazy, of Counsel.

To Mr. Wallace Reiss, Attorney for Plaintiff, 1218-1220 First Wisconsin Nat'l Bank Bldg., 735 North Water Street, Milwaukee, Wisconsin; and to the Clerk of the Circuit court for Milwaukee County.

[fol. 100] Judgment omitted. Printed side page 97, ante.

[fol. 101] Service endorsed this 12th day of September, 1934.

Jas. L. McCormack, Clerk of Circuit Court, Milwaukee County, Wis.

Service of the within notice is hereby admitted Sept. 12, 1934.

Wallace Reiss, Atty. for Pltf.

[File endorsement omitted.]

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 103] [File endorsements omitted.]

[fol. 104] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

August Term, 1934.

Nos. 212, 214, 215

STATE ex rel. PETER A. CLEARY et al., Plaintiffs,

v.

HOPKINS STREET BLDG. & LOAN ASS'N, a Wis. Corporation, et al., Defendants.

RELIANCE BLDG. & LOAN ASS'N, a Corporation, Respondent,

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants.

NORTHERN BLDG. & LOAN ASS'N, a Corporation, Respondent,

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants

Appeal from two judgments of the Circuit Court for Milwaukee County—Charles L. Aarons, Circuit Judge. Reversed.

An original action commenced pursuant to leave granted by this court. Writ granted.

OPINION—Filed Dec. 11, 1934; Filed in Circuit Court March 4, 1935

The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each brought its action to restrain the banking commission and supervisor of building and loan [fol. 105] associations from interfering with the plaintiffs in their attempt to convert their association from a State building and loan association into a federal savings and loan association. On September 14, 1934, the banking commission, with leave of this court, began an original action against the Hopkins Street Bldg. & Loan Ass'n to restrain the association, its officers and agents, from operating as a federal savings and loan association, to have defendant's attempted conversion into such an association declared null and void, and to compel the officers of said association to operate it as a Wisconsin building and loan association or to wind up its affairs as such an association in the manner provided by the statutes of this State, on the ground that the Hopkins Street Bldg. & Loan Ass'n is under the jurisdiction of the banking commission of the State of Wisconsin. The cases of Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n were tried together in the circuit court for Milwaukee county before the court without a jury. The petition for leave to commence the original action in this court stands as the complaint. There was an appearance in this action by all of the named defendants and for "Hopkins Federal Savings & Loan Ass'n, a national corporation, organized pursuant to the acts of Congress and the laws of the United States of America, and successor by conversion to Hopkins Street Bldg. & Loan Ass'n." An answer was interposed by the Hopkins Federal Savings & Loan Ass'n describing the proceedings taken and alleging the legality and sufficiency thereof in the matter of converting that association into a federal savings and loan association, a corporation under the government of the [fol. 106] United States, and praying for a rule that the banking commission of the State of Wisconsin has no jurisdiction of the defendant.

[fol. 107] FAIRCHILD, J.:

The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n, respondents on this appeal, and the Hopkins Street Bldg. & Loan Assn., defendant in the original action here, are each Wisconsin corporations organized under the provisions of ch. 215, Stats. This chapter places the control and supervision of building and loan associations under the banking commission and authorizes the commission to take possession of and liquidate such an association when it shall appear that it is violating its charter or any of the laws of the State.

On July 22, 1932, Congress enacted the Federal Home Loan Bank Act. By virtue of the provisions of this act, State building and loan associations were eligible to membership and, under certain conditions and restrictions, entitled to borrow from a Federal Home Loan Bank. The Wisconsin legislature, on July 10, 1933, by its enactment of sec. 215.07 (8), Stats., authorized Wisconsin building and loan associations, with the approval of the commissioner of banking, to become members of and borrowers from the Federal Home Loan Bank. Each of the building and loan associations here involved became members of the Federal Home Loan Bank. On June 13, 1933, there was enacted by the Congress of the United States the Home Owners' Loan Act, section 5 of which authorizes the Federal Home Loan Bank Board to provide for the organization of associations to be known as Federal Savings & Loan Ass'ns and to issue charters therefor; and on April 27, 1934, by amendment to the Home Owners' Loan Act it was provided:

"Sec. 5 (i). Any member of the Federal Home Loan Bank may convert itself into a Federal Savings & Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such [fol. 108] rules and regulations as the board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this act."

Following the passage of the amendment just referred to and without further consent or authority of the State, ap-

plication was made by the three associations to the Federal Home Loan Bank Board for permission to convert themselves into federal savings and loan associations under the provisions of sec. 5 (i) of the Home Owners' Loan Act of 1933 as amended. In each case the Federal Home Loan Bank Board granted the permission. With reference to the Hopkins Street Bldg. and Loan Ass'n, the banking commission undertook to prevent the proposed conversion, but in compliance with the order of the circuit court for Milwaukee county desisted from such attempt and the association accepted a charter from the Federal Home Loan Bank Board and has since held itself out to be a savings and loan association free from the jurisdiction and control of the banking commission of this State. An original action is brought against the association seeking to have the attempted conversion declared null, void, and of no effect. The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each began an action to restrain the banking commission from interfering with its proposed conversion. In those cases the banking commission interposed counterclaims praying for declaratory relief similar to that sought in the original action in this court and an injunctional order to prevent the proposed conversion. This is briefly a description of the record in the three matters and they present identical questions. The learned judge who tried the two cases in which judgment was entered below was of [fol. 109] the opinion that Congress had power to incorporate federal savings and loan associations; that the language of sec. 5 (i) of the Home Owners' Loan Act of 1933 as amended April 27, 1934, did not imply the necessity of consent by the State to the proposed conversion of a State loan association into a federal loan association; and that Congress had the power to authorize the conversion without the consent of the State.

The cause was first submitted upon arguments and briefs dealing to a large extent with the questions of whether Congress has power to incorporate federal savings and loan associations and as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute themselves into federal savings and loan associations. We have since been favored by the contending parties with supplemental briefs in

which are able discussions of the reservation by the State of power over corporate charters. Since then we have again examined the questions raised. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a savings and loan association under the federal act. While the other questions are well within the limits of proper discussion as outlined by the issues, it is worthy of emphasis that all other questions are incidental to this controlling question and such reference to them as may be made is in aid of the determination of the actual corporate powers of a State organized building and loan association to accomplish transmutation. This being true, we will therefore consider whether the respondents, by reason of provisions [fol. 110] in their charters of the laws of their creator, have any such power.

The respondents were created by the State of Wisconsin at a time when without question the State had plenary power to create and to control the powers of these corporations. They are not banks; they have not banking powers or privileges under our State laws. Leahy v. National Bldg. & Loan Ass'n, 100 Wis. 555, 76 N. W. 625; Julien v. Model Bldg. & Investment Ass'n, 116 Wis. 79, 92 N. W. 561; First Nat. Bank v. County of Dawson, 66 Mont. 321, — Pac. —; Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, — So. —; Hoenig v. Huntington Nat. Bank of Columbus, 59 Fed. (2d) 479, 48 L. Ed. 560; Mercantile Nat. Bank v. Hubbard, 99 Fed. 465, Ch. 215 Stats. 1933. Their charters do not authorize them to divest themselves of the corporate charter conferred upon them by the laws of the State. They have only the powers emanating from the State. These powers must be used as prescribed by the State and with due consideration for the contractual rights between the stockholders and the corporation existing by reason of State law and the charter of the corporation. Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign State by accepting a charter from any other sovereign government. Our Constitution, sec. 1, Article XI, provides:

"All general laws or special acts, enacted under the provisions of this section [section authorizing the creation of corporations] may be altered or repealed by the legislature at any time after their passage."

The people of our State thereby vested a reserve power over charters of corporations in the legislature. The idea that any other body or sovereign, a stranger to the contract, or that the corporation alone may deprive the State of this [fol. 111] power is foreign to the plain meaning of the language used in the Constitution with relation to that subject. This provision of our Constitution and similar provisions to be found in the Constitutions of other States were adopted for the purpose of overcoming in part the effect of the decision of the United States Supreme Court in Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 4 L. Ed. 629. In that case it was held that a corporation created by a State became a separate corporate entity and subject to control by the State to the extent only that citizens of the State were subject to control under the Constitution; that any amendment, alteration or repeal of its charter which withdrew or impaired the obligations of the charter was in violation of section 10, Article I, of the Constitution of the United States, which provides: "No State shall * * * pass any * * * law impairing the obligations of contracts."

The nature of the power expressly reserved by the Wisconsin constitutional provision has been dealt with in many cases both in State courts and in the courts of the United States. A reference to these cases shows the extent of this power and its proper use in controlling charters issued to corporations. In West Wisconsin R. R. Co. v. Board of Supervisors of Trempealeau Co., 35 Wis. 257, 270, referring to sec. 1, Article XI, of the Constitution, the court said:

"The object and historical origin of the provision in the Constitution of this State are matters known to all professional men. They were, through this paramount authority, to retain and secure to the State full power and control over corporate franchises, rights and privileges which it might grant—a power and control which the State was in a measure deprived of by the federal Constitution, as that instrument had been interpreted in the celebrated Dartmouth College case."

It was also considered in another celebrated case, The [fol. 112] Attorney General v. Railroad Companies, 35 Wis. 425, 574, where the court said:

"And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule of the Dartmouth College case, as applied to corporations, never had a place in this State, never was the law here. The State emancipated itself from the thraldom of that decision in the act of becoming a State; and corporations since created here have never been above the law of the land.

"Subject to this reserved right, and under the rule in the Dartmouth College case, charters of private corporations are contracts. * * * The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the State that the franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the State, which is their creator, durante bene placito.

"This is a question of State law, not of federal law. We give full scope to the federal Constitution as interpreted by the federal courts, but we stand clearly outside of both. This question could be brought within the Dartmouth College rule, not by interpretation of the federal Constitution, but by interpretation of the State Constitution only. That is our function. We accept the construction of the federal Constitution as the federal courts give it. But we give construction to our own Constitution for ourselves. And there we might well rest."

The court pointed out that the exercise of the reserve power had been sanctioned by the federal and other State courts and cited cases.

While the federal Constitution contains no power reserving to Congress the right to amend, alter or modify the charters of corporations created by it, Congress has in numerous instances reserved the power in the act by which corporations were created. In Union Pacific R. R. Co. v. United States, 99 U. S. 700, 25 L. Ed. 496, the Supreme Court of the United States had under consideration the act of Congress incorporating the Union Pacific Railroad Company, which act contained the following reservation: "Congress may at any time alter, amend or repeal this

act." Considering this in connection with a former act of Congress, the court said:

"We are of the opinion that Congress not only retains, [fol. 113] but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in Miller v. The State, 15 Wall. 498, 21 L. Ed. 104, 'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets.'"

See also Close v. Greenwood Cemetery, 107 U. S. 466, 476, — L. Ed. —; Tomlinson v. Jessup, 82 U. S. 454, 21 L. Ed. 204.

In Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 105 N. W. 1035, a law was held unconstitutional under which a mutual insurance company attempted to convert itself into a stock company pursuant to an act of the legislature of the State of Wisconsin permitting it to do so at the option of two-thirds of its existing policy holders, representing not less than one-half of its outstanding insurance. It was sought to sustain this action of the legislature under sec. 1 of Article XI as an exercise of the power thereby reserved. It was argued that since the legislature had power to provide for the dissolution of a corporation, it might also provide for the disposition of its assets to a successor corporation. The court said:

"The right of the corporation to hold its property in harmony with that situation, and the rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the State Constitution as regards the passage of laws impairing the obligations of contract, sec. 12, Art. I, Const, of Wis., and that of the national Constitution as

regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws. XIVth Amend. U. S. Const. * * * The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members in violation of the corporate charter rights of the former [fol. 114] corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto."

The matter was further dealt with in State ex rel. Northern Pacific R. Co. v. Railroad Comm., 140 Wis. 145, 157, 121 N. W. 919. In that case the court said:

"The reserve power stops short of the power to divest vested property rights, and is embodied in the State Constitution for the purpose of enabling the State to retain control over corporations, and must be construed in connection with the other provisions of the Constitution to the effect that private property shall not be taken for public use without compensation. Moreover, the power to alter or amend is a reserve power in the interest of the State to modify or repeat its own contract with the corporation. Tomlinson v. Jessup, 82 U. S. 454; State v. C. & N. W. R. Co. 128 Wis. 449, 108 N. W. 594."

There can be no doubt but that it was intended by the framers of the Constitution to reserve in the State the power to alter or repeal the charter of any corporation created by the legislature. The Constitution having thus limited the power of the legislature, it would seem to follow that the legislature is without authority to divest itself of the power reserved to it by the Constitution. But if it should be held that the legislature has such power, it is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon non-consenting members of the corporation. A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder. Martin Orchard Co. v. Fruit Growers C. Co. 203 Wis. 97, 233 N. W. 603; Huber v. Martin, supra; 7 Ruling Case Law, p. 97. And there is a fundamental and material difference between

being a member of a building and loan association over which the representatives chosen by the people of this State have the reserve power of control and being a member of [fol. 115] one created by the legislative body of a different sovereign power.

Our legislature has enacted laws covering the entire subject matter of control of these associations and has molded them to the needs of the communities, regulating the manner by which they may come into existence and continue in business. Ch. 215 Stats., 1933, expressly regulates the powers conferred upon them. If it be urged that sec. 215.07 (8), Stats. reading:

"With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provision in sub-section (2) of section 215.07 as to the one-year time limit and as to the amount that may be borrowed, to the contrary notwithstanding"

authorizes a building and loan association organized under the provisions of chapter 215 to divest itself of its charter as a State corporation, the answer is that sec. 215.07 (8) confers no such power nor was it intended to confer such power. Sec. 215.07 (2), Stats. 1933, provides:

"To borrow money for temporary purposes, not inconsistent with the objects of the association, and issue its evidences of indebtedness therefor, but for no longer term than one year and not exceeding in the aggregate amount one-fifth of the assets on hand."

Sec. 215.07 (8) is a provision authorizing building and loan associations, as to loans made from the federal home loan bank, to waive the limitation upon the power to borrow found in sec. 215.07 (2). It does not attempt to deal with the power of a building and loan association to sever the ties which bind it to the State from which it derives its charter. To hold that such power was conferred by sec. 215.07 (8) would be clear judicial legislation in a matter vitally important to the State involving large questions of public policy. Since respondents' charters do not provide for transmutation and no authority emanating from the [fol. 116] State of Wisconsin accords them the privilege, or

attempts to confer corporate power upon them to transmute, two questions are suggested. First, has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation? Second, if it be found that it was the purpose of Congress by that act thus to increase respondents' corporate powers, then, has Congress the power to accomplish this result? We are not treating specifically the second question for reasons already set forth.

As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a federal corporation upon a vote of 51 per centum of the stockholders. Nor would a state statute providing a minimum below 51 per centum [fol. 117] render the association acceptable. The 51 per centum provision set up in the federal act may readily be interpreted as the manner of consenting by the membership which the federal government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things: first, it would enable a building and loan association to escape from regulatory control reserved by the State, and second, it would divest stockholders of their

rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. Huber v. Martin, supra.

Any method under which a State association seeks to transfer itself into a Federal group without consideration of the contractual relation existing between it and the State would seem to be ineffective. It has only the powers emanating from the State and these must be used as prescribed by the State with due consideration for the contractual rights between stockholders and the association existing by reason of State laws and the charter of the corporation.

We will not review all the cases cited by respondents in support of the claim of right to transmutation, but our attention is called to Casey v. Galli, 94 U. S. 673, 24 L. Ed. [fol. 118] 168, and particular emphasis is placed on the statement in the opinion: "It was as competent for Congress to authorize the transmutation as to create such institutions originally." A receiver of a national bank, which by an act of Congress had been converted from a State bank without an enabling act by the State, brought suit against a stockholder upon his stockholder's liability. A plea in abatement based upon the failure to obtain the consent of the State was held bad. That the quoted words were intended to be a complete statement of a rule of law to the exclusion of all qualifications may well be doubted, but, even if such was the intention, we cannot recognize the result in that case as determining that the Federal government may invade the jurisdiction of the State government and appropriate for its own purposes the agencies devised by the State for the welfare of its citizens or interfere against the wish of the State with respect to contracts existing between the State and corporations of its own creation. Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to other domestic corporations organized under State law for the State's purposes in providing for the

welfare of its citizens. It ought also to be said that aside from the fact that the Home Owners' Loan Act does not deal with the general subject of banking, as did the law involved in the Galli case, it is otherwise quite different from the statute there involved and construed. That act authorized State banks to become national banks. 13 U. S. Stats. at Large, 112, 113, provided "'that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, *by authority* [fol. 119] *of this act,* become a national association under its provisions. * * *.'" It is specifically provided that "the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act." A majority of the directors are thereafter specifically given the power to execute all necessary papers essential to a perfection of the organization as a national association. This act constituted an unmistakable investiture of corporate powers upon State banks. If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will be permitted, so far as the Federal government is concerned, without purporting to increase corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin, by power reserved in its Constitution, has retained control over corporations organized under its laws, and since the State undoubtably had plenary powers, both of organization and control, prior to this act, it cannot be ousted by any act of Congress from these powers; that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no appli- [fol. 120] cation; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of

the stockholders would be an impairment of the contract rights of stockholders in a Wisconsin corporation. That these are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find.

Respondents call our attention to Ex Parte Worcester National Bank, 279 U. S. 347. From the opinion of the United States Supreme Court in that case, it appears that the Supreme Judicial Court of Massachusetts held that under the Constitution and laws of that State, a State bank could change its organization to that of a federal bank without any authority given by the State to make the change. That decision rests definitely upon a determination by the Supreme Judicial Court of Massachusetts of a questoin of State law. We shall not attempt an analysis of the decision of the Massachusetts court. The question before us is one of State law and in answering that question we must proceed in accordance with the existing law of the State of Wisconsin.

It is our conclusion that respondents have no power to transmute, and that any purported efforts in that direction are void for want of this power. It is assumed that if the act of Congress is to be given the construction contended for by respondents, it results not in the creation of a new [fol. 121] corporation but in the transfer of its allegiance by the State corporation, from the sovereignty of its creation, to the federal government. It has not been thought necessary to consider the possibility that Congress, by this act, has created a new corporation, because in that event, there being no provision in the charter of the original corporation or in the laws of Wisconsin for a transfer of its property, the corporation would find itself a naked legal entity without any means of carrying out the purposes of the transfer.

By the Court: Judgments entered in the circuit court are reversed, causes remanded with directions to enter judgment in favor of the banking commission on its counter-

claim. In the original action in this court, let the writ issue.

[fol. 122] Clerk's certficate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 123] In Supreme Court of Wisconsin

Reliance Building & Loan Association, a Corporation, Respondent,

vs.

Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Appellants

Appeal from Circuit Court, Milwaukee County, State of Wisconsin

Judgment—Dec. 11, 1934

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Wilwaukee County, in this cause, be, and the same is hereby reversed, with costs against the said respondent taxed at the sum of ——, and that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in favor of the banking commission on its counterclaim.

Clerk's certificate to foregoing paper omitted in printing.

Filed Mar. 4, 1935. Jas. L. McCormack, Clerk.

[Endorsed:] 139127. State of Wisconsin. Supreme Court. Reliance Building & Loan Ass'n, a Corporation, Respondent, against Peter A. Cleary et al., as Banking Commission, et al., Appellants. Remittitur.

[fol. 124] IN SUPREME COURT OF WISCONSIN

[Title omitted]

NOTICE OF MOTION FOR REHEARING—Filed Dec. 31, 1934

Please take notice that the plaintiff, Reliance Building & Loan Association, a corporation, above named, is filing with the Clerk of the above named Court a motion for rehearing, a copy of which is hereto annexed.

Dated, December 27, 1934.

Wallace Reiss, Attorney for Plaintiff. Lyman W. Sherwood, of Counsel.

To J. E. Finnegan, Attorney General; John E. Martin, Assistant Attorney; Benjamin Poss, Attorney for Defendants; Joseph P. Brazy, of Counsel.

[File endorsement omitted.]

[fol. 125] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed Dec. 31, 1934

Now comes Reliance Building & Loan Association, a corporation, plaintiff herein, by its respective undersigned attorney of record herein, and moves for a rehearing in the above entitled action.

Dated December 27, 1934.

Wallace Reiss, Attorney for Plaintiff. Lyman W. Sherwood, of Counsel.

[fol. 126] Received copy Dec. 28, 1934. James E. Finnegan Atty. Gen.; John E. Martin Asst. Atty. Gen.; Benj. Poss, of counsel; J. P. Brazy.

[File endorsement omitted.]

[fol. 127] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—Feb. 5, 1935

The Court being now sufficiently advised of and concerning the motion of the said respondent for a rehearing

in this cause, it is now here ordered that said motion be, and the same is hereby, denied.

[fol. 128] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF REMITTITUR—Filed March 9, 1935

To Wallace Reiss, Attorney for the Plaintiff:

You will please take notice that the remittitur of the Supreme Court of the State of Wisconsin, in the above entitled action, was received, entered of record and duly filed in the office of the Clerk of the Circuit Court of Milwaukee County, Wisconsin, on the 5th day of March, 1935.

Dated this 7th day of March, 1935.

J. E. Finnegan, Attorney General, Attorney for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel.

[fol. 129] Due and timely service of the within notice is hereby admitted this 7 day of March, A. D. 1935.

Wallace Reiss, Pl't'ff's Atty.

[File endorsement omitted.]

[fols. 130 & 131] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF MOTION FOR JUDGMENT ON REMITTITUR

To Wallace Reiss, Attorney for Plaintiff:

Please take notice that on the 9th day of March, 1935, at 9:00 o'clock A. M., or as soon thereafter as counsel can be heard, defendants will appear before the Calendar Branch of the above named Court, in the Court House in the City and County of Milwaukee, State of Wisconsin, and move for an order for judgment in accordance with the

remittitur of the Supreme Court of the State of Wisconsin on file herein, remanding this cause with directions to reverse the judgment heretofore entered and to enter judgment in favor of the defendants on their counterclaim.

Dated at Milwaukee, Wisconsin, March 7, 1935.

J. E. Finnegan, Attorney General, Attorney for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel.

[fol. 132] In Circuit Court of Milwaukee County

[Title omitted]

Objections to Entry of Judgment in Favor of Defendants

Now comes the above named plaintiff, by Wallace Reiss, its attorney, and objects to the entry of the judgment in favor of the defendants in the above entitled action for the reason that plaintiff is and was at all times a mutual loan and building association duly organized under and pursuant to Chapter 93 of the Revised Statutes of the State of Wisconsin for the year 1898, and Acts amendatory thereof and supplementary thereto, with its office and principal place of business in the city and county of Milwaukee, State of Wisconsin, engaged in the business of the creation and care of a mutual savings fund from payments made to it by its members, the making of loans to its members upon real estate security situated within Milwaukee County, Wisconsin, and such other security authorized by the laws of the State of Wisconsin, and the by-laws of said Association.

That the Congress of the United States of America enacted and the President of the United States of America approved the Federal Home Loan Bank Act, and that pursuant thereto and in accordance therewith the Federal Home Loan Bank of Chicago, located in Evanston, Illinois, was duly organized and ever since said time has been and [fol. 133] now is such duly organized, existing and operating bank; that subsequently, to wit, on or about June 13, 1933, said Congress enacted and said President approved the Home Owners' Loan Act of 1933 and provided therein, among other things, for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations" and to issue charters therefor, giving primary consideration to the

best practices of local mutual thrift and home-financing institutions in the United States; that by amendment duly enacted by said Congress and approved by said President on or about April 27, 1934, said Home Owners' Loan Act of 1933 was amended, and it was provided, among other things, in Section 5 (i) as amended by the 73rd Congress on April 27, 1934, as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such regulations and rules as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this act."

That pursuant to Section 215.07, Subparagraph 8, Wisconsin Statutes, said plaintiff, on or about June 19, 1933, applied to the banking commission of the Banking Department of the State of Wisconsin for permission and authority to become a member of and borrow money from aforementioned Federal Home Loan Bank of Chicago; that on or about July 5, 1933, such permission and authority was duly issued to and received by said plaintiff from A. C. Kingston, Commissioner of Banking of the State of Wisconsin, by said defendant, Clyde P. Diggles, as Supervisor of Building and Loan Associations of Wisconsin; that pursuant to aforementioned Federal Home Loan Bank Act and to the permission and authority so granted by said Banking Commission of the State of Wisconsin, said plaintiff, on [fol. 134] or about July 21, 1933, applied for membership, subscribed for forty-four (44) shares of stock in, to and of said Federal Home Loan Bank Board at Washington, D. C., its official certificate of membership of said plaintiff in said bank, dated as of August 11, 1933; that said plaintiff has been ever since said last mentioned date, and is now, a member in good standing and a stockholder in said Federal Home Loan Bank of Chicago.

That heretofore, to wit, on or about March 31, 1934, said plaintiff, in accordance with the provisions of said Home Owners' Loan Act of 1933, by its duly constituted officers

and directors, and by proper resolution, filed its application with and made application to said Federal Home Loan Bank of Chicago for permission to convert into a Federal Savings & Loan Association; that thereupon said bank made such examination of the affairs of the plaintiff and such appraisal as might be reasonably sufficient to determine the nature, character and value of its assets and the financial condition of said plaintiff, and that on or about July 12, 1934, after such examination and appraisal, it appeared to said Federal Home Loan Bank of Chicago, pursuant to said Home Owners' Loan Act of 1933, as amended April 27, 1934, granted permission to said plaintiff so to convert on a one hundred percent basis; that said permission so to convert has been at all times since said last mentioned date and now is outstanding and of full force and effect.

That subsequently, to-wit, on or about July 20, 1934, said plaintiff, pursuant to said Home Owners' Loan Act of 1933, as amended, by its duly constituted Board of Directors and by proper resolution, issued and caused to be mailed to each of the stockholders of said plaintiff association, at their last given postoffice address, a thirty day notice in writing of a special meeting of said stockholders to be held at 1925 W. National Avenue, city and county of Milwaukee, Wisconsin, on the 20th day of August, 1934, for the purpose of considering, determining and voting upon the rec- [fol. 135] ommendation and resolution of the Board of Directors of said plaintiff association that said plaintiff convert itself into a Federal Savings & Loan Association as aforesaid.

That at a special meeting held by the stockholders of plaintiff association called for the purpose of conversion of said association into a Federal Savings & Loan Association; that the actual number of shares represented at said meeting, either in person or by proxy was 7,352 shares, and that 7,296 shares voted in favor of the adoption of said resolution and 66 shares voted against the adoption of said resolution, and that the total outstanding stock of said association on the date of said stockholders' meeting was 10,885 shares, and by reason of the foregoing, judgment for the defendant in the above entitled action should be denied for the reason that the plaintiff, in accordance with the Constitution of the United States of America, the Acts of Con-

gress, Constitution of the State of Wisconsin, and the laws of the State of Wisconsin, has the right to convert from a State Building & Loan Association into a Federal Savings and Loan Association.

Plaintiff has complied in all respects with the requirements of the Act as amended for the purpose of conversion of said association from a State to a Federal association; that said Home Owners' Loan Act is constitutional, and the judgment entered is contrary to said Act and contrary to the Constitution of the United States of America.

Wallace Reiss, Attorney for Plaintiff.

To J. E. Finnegan, Attorney General; John E. Martin, Asst. Attorney General, Attorneys for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel.

[fol. 136] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

139127

RELIANCE BUILDING & LOAN ASSOCIATION, a Corporation, Plaintiff,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants

JUDGMENT ON REMITTITUR—Filed March 9, 1935

This cause having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge, presiding, on August 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counterclaim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin,

by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1935; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given;

On motion of J. E. Finnegan, Attorney General, Benjamin Poss and Joseph P. Brazy, of counsel, attorneys for the defendants,

[fol. 137] It is ordered, adjudged and declared:

(1) That the complaint herein be and the same hereby is dismissed upon its merits.

(2) That the plaintiff association, its officers, directors, stockholders, agents and employes be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin.

By the Court.

Charles L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin, this 9th day of March, A. D. 1935.

[fol. 138] [File endorsement omitted.]

[fol. 139] In Circuit Court of Milwaukee County

[Title omitted]

Notice of Appeal

Please take notice that Reliance Building & Loan Association, the plaintiff in this action, hereby appeals to the

Supreme Court of the State of Wisconsin from the judgment entered and rendered in this action in the Circuit Court for the county of Milwaukee, on the 9th day of March, 1935, in favor of the defendants and against the plaintiff and from the whole of said judgment. A copy of said judgment is hereto annexed.

Dated March 9, 1935.

Wallace Reiss, Attorney for Plaintiff.

To J. E. Finnegan, Attorney General; John E. Martin, Asst. Attorney General, Attorneys for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel; and to the Clerk of the Circuit Court for Milwaukee County.

[fols. 140 & 141] Judgment omitted. Printed side page 136 ante.

[fol. 142] In Circuit Court of Milwaukee County

[Title omitted]

Stipulation and Order Waiving Bond

It is hereby stipulated by and between the parties to this action, through their respective counsel, that the undertaking on appeal to the Supreme Court to pay all costs and damages by virtue of said appeal is hereby waived.

Dated this 9th day of March, 1935.

Wallace Reiss, Attorney for Plaintiff. James E. Finnegan, Atty. Gen., Attorney for Defendants. Benj. Poss, of Counsel; by Joseph P. Brazy.

Upon reading and filing the above stipulation it is hereby ordered that the undertaking on appeal to the Supreme Court to pay all costs and damages by virtue of said appeal be and the same is hereby waived.

Dated this 9th day of March, 1935.

By the Court.

Chas. L. Aarons, Circuit Judge.

[fols. 143 & 144] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 145 & 146] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER SETTING CAUSE—May 1, 1935

And now at this day came the said appellant and moved the Court that this cause be placed on the January, 1935, calendar, which motion having been submitted to the Court,

It is now here ordered that said motion be, and the same is hereby, granted and that the cause be placed on the January, 1935, calendar and be considered forthwith upon stipulation of the parties.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 147] IN SUPREME COURT OF WISCONSIN

RELIANCE BUILDING & LOAN ASSOCIATION, a Corporation, Respondent,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Appellants

Appeal from Circuit Court, Milwaukee County, State of Wisconsin

JUDGMENT—May 1, 1935

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel.

On consideration whereof, and it appearing to the satisfaction of the Court that the judgment entered in the Circuit Court of Milwaukee County dated March 9th, 1935, was entered pursuant to and in conformity with the mandate of this Court dated December 11, 1934,

It is now here ordered and adjudged by this Court that said judgment be, and the same is hereby, affirmed without costs.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 148] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 149] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed May 15, 1935

Comes now, Reliance Building and Loan Association, a corporation, appellant in the above entitled cause, and adopts its assignments of error as its statement of the points to be relied upon, and states that the whole of the record, as filed, is necessary for the consideration of the case.

Dated May 1st, 1935.

Emery J. Woodall, Attorney for Appellant. Wallace Reiss, Lyman Sherwood, of Counsel.

Service acknowledged this 8th day of May, A. D. 1935. James E. Finnegan, Atty. Gen., by J. E. Messerschmidt, Asst. Atty. Gen., Attorneys for Appellees.

[fol. 150] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 3, 1935

Appeal from the Supreme Court of the State of Wisconsin

Treating the appeal papers herein from the Supreme Court of the State of Wisconsin as an application for a writ of certiorari;

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

[fol. 151] [File endorsement omitted.]

Endorsed on cover: File No. 39,599. Wisconsin, Supreme Court. Term No. 56. Reliance Building and Loan Association, Appellant, vs. Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, et al. Filed May 15, 1935. File No. 56, O. T., 1935.

(6578-C)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 57

NORTHERN BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

PETITION FOR CERTIORARI FILED MAY 15, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 57

NORTHERN BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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[fol. 1] [File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

No. —

NORTHERN BUILDING AND LOAN ASSOCIATION, a Corporation, Plaintiff and Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER, and H. F. IBACH as the Banking Commission of the Banking Department of the State of Wisconsin, and CLYDE P. DIGGLES, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants and Appellees

PETITION FOR APPEAL—Filed May 1, 1935

To the Chief Justice of the Supreme Court of the State of Wisconsin:

Northern Building and Loan Association, a corporation, your petitioner, plaintiff and appellant in the above entitled cause, shows by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision in this cause in the Supreme Court of the State of Wisconsin, the same being the highest court of the State of Wisconsin, and the decision therein being final, manifest error has occurred, greatly to the damage of your petitioners.

This case is one in which the Circuit Court of Milwaukee County of the State of Wisconsin upon the complaint of your petitioner and other pleadings filed in this cause (No. 139,128) entered the following judgment:

"This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, circuit judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein, and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association has the right and power to convert into a federal savings and loan association, and

that the Acts of Congress so providing, are valid and constitutional.

[fol. 2] (2) That the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association.

(3) That the defendants, their agents, servants and employees be and they hereby are restrained and enjoined from taking possession of the plaintiff association or interfering in any way with the proposed conversion of the plaintiff into a federal savings and loan association.

(4) That the defendants' counterclaim be and the same hereby is dismissed on the merits."

Defendants and appellees herein appealed from said judgment to the Supreme Court of the State of Wisconsin, which court reversed said judgment by its decision filed on December 11, 1934, whereupon your petitioner moved for a rehearing which was denied by final order of the Supreme Court of the State of Wisconsin entered February 5, 1935. Over objection of petitioner, duly filed, and upon remittitur, the Circuit Court entered judgment on March 9, 1935 as follows:

"This cause having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge presiding on August 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counterclaim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin, by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1935; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given;

On motion of J. E. Finnegan, Attorney General, Benjamin Poss and Joseph P. Brazy, of counsel, attorneys for the defendants,

It is ordered, adjudged and declared:

(1) That the complaint herein be and the same hereby is dismissed upon its merits.

(2) That the plaintiff association, its officers, directors, stockholders, agents and employees be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin."

[fol. 3] Said judgment enjoined your petitioner from taking any other or further steps to convert itself into a federal savings and loan association notwithstanding that your petitioner was a member of the Federal Home Loan Bank of Chicago, had, except as prevented by said injunction, complied with all the rules and regulations of the Federal Home Loan Bank Board pursuant to paragraph 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646) precedent to issuance by the Federal Home Loan Bank Board pursuant to authority vested in such Board by said Act of Congress of a charter to your petitioner as a corporation organized and existing under and by virtue of the laws of the United States of America. Such judgment was entered also notwithstanding that paragraph (i) of Section 5 of said Act (48 Stat. 128, 134), as amended, empowered any member of a Federal Home Loan Bank to convert itself into a federal savings and loan association, and your petitioner was a member of the Federal Home Loan Bank of Chicago.

As appears from the record and proceedings in this cause and the judgment entered therein, there was drawn in question the validity of a statute of the United States, to-wit: Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress,

as amended, and the decision in this cause of the Supreme Court of the State of Wisconsin, being a final decision of the highest court of said State, is against the validity of such statute of the United States. As appears from the record and proceedings in this cause and the judgment entered therein, there was specifically set up and claimed by petitioner certain titles, rights, privileges and immunities under said statute of the United States and said judgment in this cause denies such titles, rights, privileges and immunities claimed under said statute of the United States.

Said judgment held that your petitioner originally organized as a Wisconsin corporation under and by virtue of the laws of the State of Wisconsin, to wit: Chapter 215 of the Wisconsin Statutes, as amended, had no power, under [fol. 4] such statute or under Article XI, Section 1 of the Constitution of said State, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government, to-wit: the government of the United States of America notwithstanding that under Section 2, Article VI of the Constitution of the United States said Act of Congress is the supreme law of the land. Such holding drew in question the validity of said Statute and the Constitution of the State of Wisconsin on the ground of their being repugnant to the Constitution and laws of the United States and is in favor of their validity.

The decision of the Supreme Court of Wisconsin was made, rendered and filed on December 11, 1934, the order denying the allowance of petition for rehearing from said decision was made and entered on February 5, 1935, upon remittitur, over objection of petitioner, the Circuit Court entered judgment on March 9, 1935, the final judgment in accordance with said decision was entered by said Supreme Court on the 1st day of May, 1935, upon appeal from said judgment of the Circuit Court.

Petitioner avers that the said statute of the United States, at the time of the institution of this action, had not expired by its own limitation and was not altered or repealed by law.

That, therefore, in accordance with Section 237 (a) of the Judicial Code (U. S. C., Title 28, Sec. 344), and in accordance with the Revised Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in

force when the Act of Congress approved January 31, 1928, (45 Stat. 54) was passed; to wit: under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a Writ of Error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors, filed herewith, pursuant to the Revised Rules of the Supreme Court of the United States; and there is likewise filed herewith as required by the Revised Rules of the Supreme Court of the United States, a statement as to the jurisdiction of the Supreme Court of the United States.

Wherefore, petitioner prays:

1. For the allowance of an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in order that said judgment may be examined and reversed;

[fol. 5] 2. That a transcript of the record, proceedings and papers in this cause to be made and transmitted to the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Wisconsin under his hand and the seal of the Supreme Court of the State of Wisconsin, pursuant to the Revised Rules of the Supreme Court of the United States;

3. That an order be entered fixing the amount of security for costs which petitioner shall furnish;

4. That upon proper security being furnished, all execution and other proceedings in this cause in the Supreme Court of the State of Wisconsin be stayed until the final determination of this cause upon this appeal to the Supreme Court of the United States.

John H. Schlintz, Attorney for Petitioner; Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fol. 6] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Northern Building and Loan Association, a corporation, plaintiff and appellant, in the above entitled cause, having

prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Wisconsin, on the 1st day of May, 1935, affirming a judgment entered by the Circuit Court of Milwaukee County of the State of Wisconsin on the 9th day of March, 1935, in accordance with an order directed to said Circuit Court by the Supreme Court of the State of Wisconsin, pursuant to a decision filed by said Supreme Court in said cause on the 11th day of December, 1934, and the order denying a motion for rehearing made and entered (on Feb. 5, 1935) and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, pursuant to the statutes of the United States and Revised Rules of the Supreme Court of the United States in such case made and provided;

[fol. 7] It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall pursuant to the Revised Rules of the Supreme Court of the United States prepare and certify under his hand and the Seal of the Supreme Court of the State of Wisconsin a transcript of the record and all opinions delivered in this cause and transmit the same to the Supreme Court of the United States, so that the same shall be filed in the Supreme Court of the United States pursuant to the Revised Rules of the Supreme Court of the United States by or before the return day.

And it is further ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of One Thousand ($1,000.00) Dollars, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, and that such supersedeas bond, as filed and approved, shall stay all execution and other proceedings in this cause in the Supreme Court of the State of Wisconsin until the final disposition of this cause by the Supreme Court of the United States.

Dated this 1st day of May, A. D. 1935.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 8] IN SUPREME COURT OF THE UNITED STATES, — TERM, 1935

[Title omitted]

ASSIGNMENT OF ERRORS

Northern Building and Loan Association, a corporation, appellant herein, as required by Section 997 of the Revised Statutes (U. S. C., Title 28, Sec. 862) and in accordance with Rule 9 of the Revised Rules of the Supreme Court of the United States, assigns the following errors in the record and proceedings in the Supreme Court of the State of Wisconsin in the above entitled cause:

1. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of an order by the Circuit Court of Milwaukee County, restraining and enjoining appellant from converting into a federal savings and loan association.

2. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of the judgment by the Circuit Court of Milwaukee County dismissing appellant's complaint upon its merits.

3. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of a judgment declaring that appellees have full power and authority to take possession of appellant association under the laws of the State of Wisconsin.

4. The Supreme Court of the State of Wisconsin erred under the pleadings in this cause in its decision in holding Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended, and more particularly paragraph (i) of Section 5 of said Act, as amended (48 Stat. 643, 646), invalid under the Constitution of the United States of America.

5. The Supreme Court of the State of Wisconsin erred

(a) In refusing in its decision to recognize and give effect to an Act of Congress validly enacted in the execution of the powers vested in the Federal Congress by the Constitution of the United States of America, to wit, Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended.

[fol. 9] (b) In retarding, impeding, burdening and controlling the operations of said Act of Congress; and

(c) In denying titles, rights, privileges and immunities of appellant specially set up and claimed by appellant under said Act of Congress.

6. The Supreme Court of the State of Wisconsin erred in holding Chapter 215 of the Statutes of Wisconsin and Section 1 of Article IX of the Constitution of the State of Wisconsin valid as not repugnant to paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 646), or to Section 2 of Article VI of the Constitution of the United States, which provides that the laws of the United States are the Supreme law of the land.

This is particularly true (a) when the Supreme Court of the State of Wisconsin in said holding construed said state statute and said section of the state constitution as blocking the flow of power from the Congress of the United States under said Act of Congress, as amended (48 Stat. 643, 646), enabling appellant to divest itself of its state charter and to accept a charter from the sovereign government of the United States by conversion and, (b) when Wisconsin Statutes as was recognized in said decision of the Supreme Court of the State of Wisconsin

(aa) Were silent upon the subject of conversion, and

(bb) Neither expressly prohibited conversion nor expressly empowered appellant so to convert.

7. The Supreme Court of the State of Wisconsin erred in holding that paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646), merely permitted Wisconsin associations to convert only if and when the legislature of the State of Wisconsin enacted legislation consenting to such conversion, but did not empower conversion of appellant without legislation of the State of Wisconsin consenting to such conversion.

Prayer for Reversal

For which errors, appellant prays:

(1) That the decision and judgment of the Supreme [fols. 10-28] Court of the State of Wisconsin in the above entitled cause be reversed,

(2) That the writ of injunction issued be quashed and the injunction be dissolved, and

(3) That a judgment be rendered in favor of appellant, as prayed for in appellant's complaint as filed in the Circuit Court of Milwaukee County, and for costs.

John H. Schlintz, Attorney for Petitioner; Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fols. 29-31] Bond on appeal for $1,000.00 approved and filed May 1, 1935, omitted in printing.

[fols. 32-35] Citation in usual form showing service on Peter A. Cleary et al., filed May 1, 1935, omitted in printing.

[fol. 36] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES, — TERM, 1935

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 1, 1935

To the Clerk of the Supreme Court of the State of Wisconsin:

Appellant in the above entitled cause hereby indicates the portions of the record to be incorporated in the transcript thereof as follows:

1. Plaintiff's complaint in the original action in the Circuit Court of Milwaukee County of the State of Wisconsin, verified July 25, 1934.

2. Plaintiff's motion for issuance of an order to show cause and of a temporary restraining order, directed to defendants, made July 25, 1934.

3. Order to show cause of said Circuit Court, entered July 25, 1934, directed to defendants and order restraining defendants from seizing, taking possession of, or interfering in any way with plaintiff.

4. Summons in the original action, served July 25, 1934.

5. Motion by defendants to vacate said temporary restraining order and praying for an order restraining plain-
[fol. 37] tiff from proceeding with conversion pending final determination of the cause, made July 27, 1934.

6. Order restraining plaintiff from proceeding further with conversion pending the final determination of the cause, entered August 14, 1934.

7. Defendants' answer and counter claim, verified July 27, 1934.

8. Stipulation by respective counsel amending answer and counter claim, dated August 14, 1934.

9. Order of said Circuit Court amending answer and counter claim, entered August 14, 1934.

10. Plaintiff's reply to counter claim, verified August 7, 1934.

11. Stipulation by respective counsel that issue had been joined, that no issues of fact had been presented, and that court may render judgment upon the merits of the cause, dated August 7, 1934.

12. Affidavit of Secretary of plaintiff association that at a meeting of plaintiff association a majority of the total number of shares of stock of said association were voted in favor of conversion, dated September 12, 1934, and affidavit of Secretary as to plaintiff's assets and liabilities, August 3, 1934.

13. Decision of said Circuit Court, filed September 11, 1934.

14. Order of said Circuit Court for judgment, entered September 12, 1934.

15. Judgment of said Circuit Court, entered September. 12, 1934.

16. Defendants' notice of appeal, dated September 12, 1934.

17. Certificate of the Clerk of said Circuit Court, dated September 19, 1934.

18. Temporary restraining order directed to plaintiff, restraining it from taking further steps to convert itself pending final determination of the cause, entered September 12, 1934.

19. Defendants' appeal to the Supreme Court of the State of Wisconsin, dated September 12, 1934.

20.

21.

[fol. 38] 22. Decision of said Supreme Court, filed December 11, 1934.

23. Plaintiff's motion for rehearing, made December 19, 1934.

24. Order of said Supreme Court denying plaintiff's motion for rehearing, entered February 5, 1935.

25. Remittitur of cause to said Circuit Court, dated March 2, 1935.

26. Order of said Supreme Court to said Circuit Court directing judgment to be entered in favor of defendants on their counter claim, entered March 2, 1935.

27. Notice to plaintiff of remittitur, dated March 7, 1935.

28. Notice to plaintiff of defendants' motion for order for judgment in accordance with said Supreme Court's order on the remittitur, dated March 7, 1935.

29. Motion of defendants for order for judgment, made March 9, 1935, and plaintiff's objection to entry and judgment March 9, 1935.

30. Judgment of said Circuit Court entered March 9, 1935, in accordance with order of said Supreme Court entered March 9, 1935.

31. Plaintiff's notice of appeal, dated March 9, 1935, from said judgment of said Circuit Court, entered March 9, 1935.

32. Stipulation of respective counsel waiving cost and supersedeas bond on such appeal, dated March 9, 1935.

33. Order of said Circuit Court approving said stipulation of counsel, entered March 9, 1935.

34. Certificate of Clerk of said Circuit Court, dated April 24, 1935.

35. Plaintiff's appeal, dated March 9th, 1935, from the judgment of said Circuit Court, entered March 9, 1935.

36. Decision of said Supreme Court, filed *Dec. 11, 1934*, [fol. 39] May 1st. 1935, affirming judgment of said Circuit Court entered in favor of defendants, March 9, 1935.

37. Plaintiff's motion to said Supreme Court, made May 1st, 1935.

38. Order of said Supreme Court denying plaintiff's motion May 1st, 1935.

39. Plaintiff's petition for appeal to the Supreme Court of the United States, dated May 1st, 1935.

40. Plaintiff's assignment of errors and prayer for reversal, dated May 1st, 1935.

41. Plaintiff's statement of jurisdiction on appeal, dated May 1st, 1935.

42. Order of Supreme Court of State of Wisconsin allowing plaintiff's appeal, entered May 1st, 1935.

43. Plaintiff's cost and supersedeas bond, dated May 1st, 1935.

44. Citation directed to defendants, bearing proof of service, dated May 1st, 1935.

45. Proof of service of appeal papers on defendants, dated May 1st, 1935.

46. Copy of this praecipe, dated May 1st, 1935.

47. Certificate of Clerk of the Supreme Court of the State of Wisconsin, dated May 1st, 1935.

John H. Schlintz, Attorney for Petitioner; Emery J. Woodall, Lyman W. Sherwood, of Counsel.

[fol. 40] Received copy and admit service the 1st day of May, 1935.

James E. Finnegan, Atty. Gen., by J. E. Messerschmidt, Asst. Atty. Gen.

[fol. 41] [Caption omitted.]

[fol. 42] In Circuit Court of Milwaukee County

[File endorsement omitted]

Northern Building & Loan Association, a Corporation, Plaintiff,

versus

Peter A. Cleary, S. N. Schafer and H. F. Ibach as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants

Order to Show Cause—Filed July 31, 1934

On the verified complaint of plaintiff hereto attached, on all the records, files and proceedings in the above entitled action, and on motion of John H. Schlintz, attorney for said plaintiff,

It is ordered that said defendants, and such of them, show cause, if any they have, before the court above named, in the Calendar Branch thereof, presided over by the Honorable John C. Kleczka, Circuit Judge, in the Calendar Court Room #500, in the New Court House in the city of Milwaukee, Milwaukee County, Wisconsin, on the 10th day of Sept., 1934, at nine o'clock A. M., or as soon thereafter as counsel can be heard, why the relief as prayed for in said complaint should not be granted.

It is further ordered that pending the hearing herein, and the further order of the court, said defendants, and each of them, as Banking Commission and Supervisor of Building and Loan Associations of the State of Wisconsin, their

employees, officers, agents and representatives, be and they hereby are temporarily enjoined and restrained from seiz-
[fol. 43] ing, taking possession of, or in any manner interfering with the property of every nature and kind of said plaintiff association.

It is further ordered that pending the hearing herein and the further order of this court, said defendants, and each of them, as Banking Commission and the Supervisor of Building and Loan Associations of the State of Wisconsin, be and they hereby are enjoined and restrained from removing the officers or directors, or in any manner interfering with the officers, directors or stockholders of said plaintiff in the conduct of the regular and lawful business of said plaintiff and in the conduct of any meeting or meetings called for the purpose of considering corporate business, and more particularly the conversion of said plaintiff Association into a Federal Savings and Loan Association.

Let a copy of this order to show cause and of the verified summons and complaint attached hereto be served on said defendants, and each of them, at least 10 days before the time set for hearing herein.

Dated, Milwaukee, Wisconsin, this 25 day of July, 1934.

Walter Schinz, Circuit Judge.

[fol. 44] In Circuit Court of Milwaukee County

[Title omitted]

[File endorsement omitted.]

Summons—Filed July 31, 1934

The State of Wisconsin, to the said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

John H. Schlintz, Attorney for Plaintiff. Post office address, 152 W. Wisconsin Avenue, 416 Caswell Block, Milwaukee, Milwaukee County, Wisconsin.

[fol. 45] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

COMPLAINT—Filed July 31, 1934

Said plaintiff, Northern Building & Loan Association, by John H. Schlintz, its attorney, complains of said defendants and for cause of action alleges:

1. That plaintiff is and was at all times herein mentioned, a mutual loan and building association, duly organized under and pursuant to Chapter 93 of the Revised Statutes of the State of Wisconsin for the year 1898, and acts amendatory thereof and supplementary thereto, with its office and principal place of business in the city of Milwaukee, Milwaukee County, Wisconsin, engaged in the business of the creation and care of a mutual savings fund from payments made to it by members, the making of loans to its members upon real estate security situated within Milwaukee County, Wisconsin, and such other security authorized by the laws of the State of Wisconsin, and the By-laws of said Association.

2. That said defendants, Peter A. Cleary, S. N. Schafer and H. F. Ibach are and were at all times herein mentioned the duly appointed, qualified and acting Banking Commission of the Banking Department of the State of Wisconsin, and said defendant, Clyde P. Diggles is and was at all times [fol. 46] herein mentioned the duly appointed, qualified and acting Supervisor of Building and Loan Associations of said Banking Commission; that said defendants as such Banking Commission and as such Supervisor have power and authority pursuant to the Statutes of said state to supervise, examine and control the affairs of building and loan associations in said state and more particularly the affairs of said plaintiff.

3. That heretofore the Congress of the United States of America enacted and the President of the United States of America approved the Federal Home Loan Bank Act, and that pursuant thereto and in accordance therewith the Federal Home Loan Bank of Chicago, located in Evanston, Illinois, was duly organized and ever since said time has

been and now is such duly organized, existing and operating bank; that subsequently, to wit: on or about June 13, 1933, said Congress enacted and said President approved the Home Owners' Loan Act of 1933 and provided therein, among other things, for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations" and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States; that by amendment duly enacted by said Congress and approved by said President on or about April 27, 1934, said Home Owners' Loan Act of 1933 was amended, and it was provided, among other things, in Section 5 (i) as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the con- [fol. 47] verted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

4. That pursuant to Section 215.07, Subparagraph 8, Wisconsin Statutes, said plaintiff, on or about November 14, 1932, applied to the banking commission of the Banking Department of the State of Wisconsin for permission and authority to become a member of and borrow money from aforementioned Federal Home Loan Bank of Chicago; that on or about November 16, 1932, such permission and authority was duly issued to and received by said plaintiff from A. G. Kingston, Commissioner of Banking of the State of Wisconsin by said defendant, Clyde P. Diggles, as Supervisor of Building and Loan Associations of Wisconsin; that pursuant to aforementioned Federal Home Loan Bank Act and to the permission and authority so granted by said Banking Commission of the State of Wisconsin, said plaintiff, on or about October 17, 1932, applied for membership, subscribed for forty-four (44) shares of stock in, to and of said Federal Home Loan Bank of Chicago, and on or about January 5, 1933, received from the Federal

Home Loan Bank Board at Washington, D. C., its official certificate of membership of said plaintiff in said bank dated as of August 11, 1933; that said plaintiff has been ever since said last mentioned date and is now a member in good standing and a stockholder in said Federal Home Loan Bank of Chicago.

5. That heretofore, to wit, on or about March 12, 1934, said plaintiff, in accordance with the provisions of said Home Owners' Loan Act of 1933, by its duly constituted officers and directors and by proper resolution, filed its application with and made application to said Federal Home Loan Bank of Chicago for permission to convert into a Federal Savings and Loan Association; that thereupon said bank made such examination of the affairs of the plain-[fol. 48] tiff and such appraisal as might be reasonably sufficient to determine the nature, character and value of its assets and the financial condition of said plaintiff, and that on or about July 20, 1934, after such examination and appraisal, it appeared to said Federal Home Loan Bank of Chicago that conversion of said plaintiff into a Federal Savings and Loan Association was feasible and advisable, and accordingly, on said last mentioned date, said Federal Home Loan Bank of Chicago, pursuant to said Home Owners' Loan Act of 1933 as amended April 27, 1934, granted permission to said plaintiff so to convert on a one-hundred-per-cent (100%) basis; that said permission so to convert has been at all times since said last mentioned date and now is outstanding and of full force and effect.

6. That subsequently, to wit, or or about July 24, 1934, said plaintiff, pursuant to said Home Owners' Loan Act of 1933, as amended, by its duly constituted Board of Directors and by proper resolution, issued and caused to be mailed to each of the stockholders of said plaintiff Association, at their last given post office address, a thirty-day notice in writing of a special meeting of said stockholders to be held at 2964 North Eleventh Street, city and county of Milwaukee, Wisconsin, on the 14th day of August, 1934, for the purpose of considering, determining and voting upon the recommendation and resolution of the Board of Directors of said plaintiff Association that said plaintiff convert itself into a Federal Savings and Loan Association as aforesaid.

7. That, as plaintiff is informed and verily believes, said defendants, and each of them, during the process of conversion of a similar building and loan association of Wisconsin, to wit: the Hopkins Street Building & Loan Association of Wisconsin, from a state to a Federal Building & Loan Association, threatened to take possession of said Association, its books, accounts, records and business, and [fol. 49] said defendants actually seized the books and accounts of said Association and attempted to take possession of said Association and to control its affairs on or about June 5, 1934; that said defendants refused to surrender and to return to said Association aforementioned property, books, records, and accounts, etc., until they were compelled to do so by order of said court.

8. That, as plaintiff is informed and verily believes, said defendants, and each of them, during the process of conversion similar to plaintiff's proposed conversion, from a State to a Federal Savings and Loan Association, on part of the West Lawn Building & Loan Association, located at Racine, Wisconsin, also threatened to seize and take over the business of said association by taking possession of its office, books and records, by threatening to oust the Board of Directors, by interfering with stockholders meetings and attempting to influence stockholders meetings, and by threatening said Association that if its proposed special stockholders meeting called for June 11, 1934, were not adjourned or dismissed, said defendants would, on the morning of June 11, 1934, take over all of the property of said Association, and that said defendants, and each of them, were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with said Association and its proposed meeting and conversion.

9. That, as plaintiff is informed and verily believes, said defendants, and each of them, immediately upon receipt of information or notice of the proposed conversion by said plaintiff as aforesaid and the proposed meeting of its stockholders, intend to attempt to seize and take over the affairs, business, property and assets of said plaintiff association, and to interfere with and prevent the proposed meeting of its stockholders, contrary to law and the Statutes, and without cause, excuse or justification; that, as [fol. 50] plaintiff is informed and verily believes, said de-

fendants, and each of them, have threatened and will proceed to oust the officers and directors and to take possession of the business assets and operation of each and every building and loan association of the State of Wisconsin which attempts or takes any steps toward converting itself into a Federal Savings and Loan Association, and more particularly the plaintiff Association, and for no other cause, purpose, reason or excuse than merely the fact of such attempted and proposed conversion.

10. That said plaintiff is not now violating and never has violated its Charter, by-laws, or any law under which it operates or the direction or orders of the Banking Department or the banking commission or the Supervisor of Building and Loan Associations of the State of Wisconsin; that the affairs of said Association are in sound condition, its business is conducted in a safe and authorized manner, its capital is wholly unimpaired, it is now and has been at all times herein mentioned a solvent and going concern, and that there is no valid reason, cause or excuse, and no legal or equitable grounds for said defendants, or any or either of them, to take possession of said plaintiff Association; that all the assets, books of account, records and proceedings of said plaintiff association, including both real and personal property, are located and are within the County of Milwaukee, State of Wisconsin, and that such proposed and threatened seizure and control by said defendants is contrary to the judgment and will of the officers, directors and stockholders of said corporation and will result in serious and irreparable damage to said plaintiff Association.

Wherefore this plaintiff demands judgment against said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations:

[fol. 51] 1. That an order be issued temporarily restraining and enjoining said defendants, and each of them, their employees, agents and representatives, from seizing, taking possession of, carrying away, keeping or retaining any of the property, books of accounts, records, or assets of said plaintiff, and from interfering with the conduct and management of the business of said plaintiff Association.

2. That said defendants, and each of them, their employees, agents and officers, be restrained and enjoined

from interfering with the officers, directors or stockholders of said plaintiff Association, and with any meeting or meetings of said officers, directors or stockholders called for the purpose of considering, determining and voting upon the lawful business and affairs of said plaintiff Association, and more particularly aforementioned proposed conversion.

3. That said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations of Wisconsin, their employees, agents and representatives be permanently restrained and enjoined from interfering with the property and lawful conduct and business of said plaintiff.

4. That plaintiff have such other and further relief as may appear just and equitable in the premises.

John H. Schlintz, Attorney for Plaintiff.

[fols. 52 & 53] *Duly sworn to by B. F. Kuehlhorn. Jurat omitted in printing.*

[fol. 54] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

ANSWER AND COUNTERCLAIM—Filed July 31, 1934

Now come the defendants and for their answer to the complaint hereby:

I

Admit the allegations contained in paragraphs designated "I", "II", "III", "IV", and "VII" of the complaint.

II

Admit upon information and belief the allegations contained in paragraphs designated "V" and "VI" of the complaint.

III

Deny all of the allegations contained in paragraph designated "VIII" of the complaint except that the said defend-

ants were enjoined by order of the Circuit Court of Racine County, Wisconsin from interfering with said association and its proposed meeting and conversion.

IV

With reference to the allegations contained in paragraph designated "IX" of the complaint, allege that the first information or notice of the proposed conversion by the plain- [fol. 55] tiff was received by the defendants upon the service of the summons and complaint in this action, and prior to the service of said summons and complaint the defendants had no information or notice of any kind whatsoever of said proposed conversion; allege that the defendants have made no attempt to seize and take over the affairs, business property or assets of the plaintiff; allege that the defendants have made no attempts to interfere with or prevent the proposed meeting of the plaintiff's stockholders; deny that the defendants have threatened to oust the officers and directors to take possession of the business, assets and operation of the building and loan associations of the State of Wisconsin which attempt to or take any steps toward conversion into a federal savings and loan association; deny that the defendants have made any threats with reference to the plaintiff association.

V.

With reference to the allegations contained in paragraph designated "X" of the complaint, allege that the attempted conversion by the said plaintiff association as set forth in the complaint was and is a violation of its charter, by-laws, and the laws of the State of Wisconsin; allege that under the laws of the State of Wisconsin the Banking Commission is authorized to take possession of the property and business of any building and [illegible] association organized under the laws of the State of [illegible]nsin which has violated its charter or the laws of this State; deny that the taking over of possession of the plaintiff by the defendants will result in any damage to the plaintiff association.

VI.

As a separate defense to this action, the defendants allege upon information and belief that under and pursuant to

[fol. 56] the provisions of Sec. 215.33 (10) of the Wisconsin statutes the Circuit Court of Milwaukee County has no right or power to entertain the alleged cause of action contained in plaintiff's complaint and that the plaintiff's sole remedy in the event that the property and business of the plaintiff is taken over by the Banking Commission, if it deem itself aggrieved thereby, is to apply to the Circuit Court of Dane County to enjoin further proceedings by said Banking Commission.

Further answering the complaint herein and by way of counterclaim, the defendants allege as follows:

I.

The plaintiff is a building and loan association organized and existing under and by virtue of the laws of the State of Wisconsin with its principal office and place of business in the City and County of Milwaukee, Wisconsin.

II.

The defendants Peter A. Cleary, S. N. Schafer and H. F. Ibach are the duly appointed, qualified and acting banking commissioners of the Banking Department of the State of Wisconsin; the defendant Clyde P. Diggles is the duly appointed, qualified and acting building and loan supervisor employed by the Banking Commission of the State of Wisconsin.

III.

Pursuant to the provisions of Chapter 215 of the Wisconsin statutes, said Banking Commission is vested with the control and supervision of all building and loan associations organized under the laws of the State of Wisconsin or other similar laws, or authorized to transact business in the State of Wisconsin; pursuant to the provisions of Sec. [fol. 57] 215.33 of the Wisconsin statutes said Banking Commission is given full power to take possession and liquidate a building and loan association when it shall appear, among other things, that said building and loan association has violated its charter or any of the laws of the State of Wisconsin.

IV.

On or about March 12, 1934, the plaintiff through its officers and directors made application, without the consent

or authority of the Banking Commission of the State of Wisconsin, to the Federal Home Loan Bank Board for permission to convert itself into a federal savings and loan association under the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933 as amended by the Seventy-third Congress on April 27, 1934. Thereafter, as defendants are informed and believe, the said Federal Home Loan Bank Board granted said permission to said plaintiff association.

V.

Subsequently, to-wit: on or about July 24, 1934, the said plaintiff, as defendants are informed and believe, mailed to each of its stockholders a notice in writing of a special meeting of said stockholders to be held August 14, 1934 for the purpose of voting upon a recommendation and a resolution of the Board of Directors of said plaintiff association that said plaintiff convert itself into a federal savings and loan association.

VI.

As defendants are informed and believe, the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of [fol. 58] Wisconsin; that any acts of Congress or rules and regulations of the Federal Home Loan Bank Board which purport to authorize said conversion without the consent of and in violation of the laws of the State of Wisconsin are void and of no effect and in violation of the Constitution of the United States of America and the Constitution of the State of Wisconsin; that Congress has no right or power under the Constitution of the United States of America to authorize the conversion of a state building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without state legislation consenting to such conversion.

VII.

As defendants are informed and believe, the plaintiff association will unlawfully convert itself into a federal savings and loan association unless restrained by this Court from taking any further steps in said attempted conver-

sion; that said plaintiff proposes and intends to accept a charter from the Federal Home Loan Bank Board and to discontinue doing business as a Wisconsin building and loan association under the jurisdiction of the Banking Commission; that the plaintiff intends to transfer all of its assets to said proposed federal association and to issue to its members stock certificates in said federal association in lieu of stock certificates issued by the plaintiff, all in violation of the laws of the State of Wisconsin and the orders of the Banking Commission of the State of Wisconsin.

Wherefore, the defendants pray judgment against the plaintiff as follows:

(1) Dismissing the complaint of the plaintiff herein upon its merits.

(2) Declaring that the defendants have full power and authority to take possession of the plaintiff association [fol. 59] under the laws of the State of Wisconsin.

(3) Restraining and enjoining the plaintiff association, its officers, directors, stockholders, agents and employes, from taking any other or further steps in said attempted conversion by said plaintiff into a federal savings and loan association.

(4) And for such other and further relief as may be just an equitable and for the defendants' costs and disbursements in this action.

J. E. Finnegan, Attorney General, John E. Martin, Assistant Attorney General, Benjamin Poss, Of Counsel, Attorneys for the Defendants.

[fols. 60 & 61] *Duly sworn to be Peter A. Cleary. Jurat omitted in printing.*

[fol. 62] [File endorsement omitted.]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

STIPULATION AND ORDER AMENDING ANSWER AND COUNTER-CLAIM—Filed Aug. 14, 1934

It is hereby stipulated and agreed by and between the parties to the above entitled action through their respective

counsel that defendants may amend their Answer and Counterclaim in the following manner:

(a) By striking paragraph designated "VI" of the defendants' Answer.

(b) By amending paragraph designated "VI" of the defendants' Counterclaim so as to read as follows:

"VI

Defendants are informed and believe that the United States of America has no right or power to create federal savings and loan associations; that the provisions of Sec. 5 of the Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of such federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such associations; that the creation of such associations is wholly outside the powers vested in Congress by Sec. 8 of Article I of the Constitution, or any other provision of the Constitu- [fol. 63] tion of the United States, and is in direct violation of Article X of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor" is an unconstitutional delegation of legislative power by the Congress of the United States in violation of Sec. 1 of Article I of the Constitution of the United States; that the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan associataion into a federal

savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without State consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the [fol. 64] United States, or any other provision of the Federal Constitution, and is in violataion of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) deny to all stockholders of the plaintiff association who do not desire the association to convert, the equal protection of the laws and deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States."

John H. Schlintz, Attorney for Plaintiff. James C. Finnegan, Att'y Gen'l; J. E. Martin, Ass't Att'y Gen'l, and Benj. Poss of Counsel, by J. P. Brazy, Attorneys for Defendants.

Upon the foregoing stipulation, it is ordered:

(a) That paragraph designated "VI" of the defendants' Answer be and the same is hereby stricken.

(b) That paragraph designated "VI" of the defendants' counterclaim be and hereby is amended so as to read:

"VI

Defendants are informed and believe that the United States of America has no right or power to create federal savings and loan associations; that the provisions of Sec. 5 of the Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of such federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such associations; that the creation of such associations is wholly outside the powers vested in Congress by Sec. 8 of Article I [fol. 65] of the Constitution, or any other provision of the Constitution of the United States, and is in direct violation of Article X of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of

said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as 'Federal Saving and Loan Associations', and to issue charters therefor" is an unconstitutional delegation of legislative power by the Congress of the United States in violation of Sec. 1 of Article I of the Constitution of the United States; that the plaintiff association has no right or power to convert itself into a federal savings and loan association; that such conversion is in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without State consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitu-
[fols. 66 & 67] tion of the United States, or any other provision of the Federal Constitution, and is in violation of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) deny to all stockholders of the plaintiff association who do not desire the association to convert, the equal protection of the laws and deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States.

By the court:

Chas. L. Aarons, Circuit Judge.

Dated August 14th, 1934.

[fol. 68] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

REPLY—Filed Sept. 11, 1934

And now comes the above named plaintiff and for reply to defendants' answer and counterclaim and amended answer and counterclaim herein:

I

Admits the allegations contained in Paragraph I.

II

Admits the allegations contained in Paragraph II.

III

Admits the allegations contained in Paragraph III.

IV

Admits the allegations contained in Paragraph IV of said counterclaim, and in further answer thereto alleges that the consent or authority of the Banking Commission of the State of Wisconsin, to convert itself into a Federal Savings and Loan Association is not required or necessary under the provisions of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended by the Seventy-third Congress on April 27, 1934.

[fol. 69]

V

Admits the allegations contained in Paragraph V.

VI

Denies that plaintiff association has no right or power to convert itself into a Federal Savings and Loan Association, and denies that such conversion is in violation of its charter or the laws of the State of Wisconsin; denies that the acts of Congress or rules and regulations of the Federal Home Loan Bank Board which purport to authorize said conversion without the consent of and in violation of the laws of the State of Wisconsin are void and of no effect

and in violation of the Constitution of the United States of America and the Constitution of the State of Wisconsin; denies that the Congress has no right or power under the Constitution of the United States of America to authorize the conversion of a state building and loan association into a Federal Savings and Loan Association, contrary to the laws of the State of Wisconsin, or without state legislation consenting to such conversion as alleged in Paragraph VI of defendants' counterclaim.

VII

Plaintiff denies that it will unlawfully convert itself into a Federal Savings and Loan Association, unless restrained by the court from taking any further steps in said attempted conversion; admits that it proposes and intends to accept a charter from the Federal Home Loan Bank Board and in the event said charter is granted, to discontinue doing business as a Wisconsin building and loan association, in the event the stockholders of said plaintiff association should so elect at a meeting regularly held for such [fol. 70] purpose; denies that any act in said attempted conversion as alleged in Paragraph VII of defendants' counterclaim is in violation of the laws of the State of Wisconsin, and orders of the banking commission of the State of Wisconsin.

VIII

Denies that the United States of America has no right or power to create Federal Savings and Loan Associations; denies that the provisions of Section 5 of the Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of such Federal Savings and Loan Associations, are unconstitutional and denies that the Congress has no express or implied power to create such associations; denies that the creation of such associations is wholly outside the powers vested by Congress by Section 8 of Article I of the Constitution, or any other provision of the Constitution of the United States, and denies that it is in direct violation of Article X of the Amendments to the Constitution of the United States; denies that the provisions of Section 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board the power and authority,

"under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation, of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor" is an unconstitutional delegation of legislative power by the Congress of the United States and denies that it is in violation of Section 1 of Article I of the Constitution of the United States; denies that the plaintiff association has no right or power to convert itself into a Federal Savings and Loan Association; denies that such [fol. 71] conversion is in violation of its charter and the laws of the State of Wisconsin; denies that the provisions of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and denies that it would be in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan association into a Federal Savings and Loan Association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; denies that said Section 5 (i) if construed to permit said conversion without State consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Section 8 of Article I of the Constitution of the United States, or any other provision of the Federal Constitution, and denies that it is in violation of Article X of the Amendments to the Constitution of the United States; denies that the provisions of said Section 5 (i) deny to all stockholders of the plaintiff association who do not desire the association to convert, the equal protection of the laws and deprive them of property without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Wherefore, plaintiff demands judgment as prayed for in its complaint and that defendants' counterclaim be dismissed with costs.

John H. Schlintz, Attorney for Plaintiff; Lyman Sherwood, Of Counsel.

[fol. 72] *Duly sworn to by B. F. Kuehlhorn. Jurat omitted in printing.*

[fol. 73] Due service is hereby admitted 7th day of August, 1934.

Poss, Toelle & Schuler, by J. P. Brazy.

[fols. 74 & 75] In Circuit Court of Milwaukee County

[Title omitted]

[File endorsement omitted.]

Notice of Motion for Restraining Order, etc.—Filed July 31, 1934.

Please take notice that the defendants will move this Court for an order vacating the temporary restraining order contained in the order to show cause issued in this action under date of July 25, 1934 before the Calendar Branch of the Circuit Court at the Court House in the City and County of Milwaukee, Wisconsin, on August 4, 1934 at 9:00 o'clock A. M. or as soon thereafter as counsel can be heard.

At said time and place the said defendants will further move the Court upon the verified answer and counterclaim of the defendants herein for an order restraining and enjoining the plaintiff, its officers, directors, stockholders, agents and employes, pending the final determination of this action, from taking any other or further steps in its attempt to convert into a federal savings and loan association.

Dated July 27th, 1934.

J. E. Finnegan, Attorney General; John E. Martin, Assistant Attorney General; Benjamin Poss, of Counsel, Attorneys for the Defendants.

To John H. Schlintz, Esq., Attorney for Plaintiff.

[fol. 76] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF B. F. KUEHLHORN—Filed Aug. 7, 1934

STATE OF WISCONSIN,
Milwaukee County, ss:

B. F. Kuehlhorn, being first duly sworn on oath deposes and says that he is an officer of the above named plaintiff corporation, to wit: Secretary thereof.

That the following is a true and correct trial balance of the assets and liabilities of said Northern Building & Loan Association, as of the 30th day of June, 1934, to wit:

Assets

Assets	$2,527,591.74	
Cash on hand	27,749.58	
Total assets		$2,555,341.32

Liabilities

Installment stock due	$430,616.65	
" " Dividends	66,116.18	
Paid-up stock	1,699,400.00	
Federal Home Loan Bank Note payable	226,750.00	
Incomplete mortgage loans	25.00	
Forfeited stock	9.52	
Real estate reserve	- 4,652.41	
Contingent fund	118,000.00	
Undivided profits	9,771.56	
Total liabilities		$2,555,341.32

[fols. 77 & 78] That the source of your affiant's knowledge and grounds for his belief as to the truth of the foregoing statement is his personal knowledge of the books and records of said association and from the reports made to him by his subordinates in his employ as such officer of said Association.

B. F. Kuehlhorn.

Subscribed and sworn to before me this 3rd day of August, 1934. John Schlintz, Notary Public, Milwaukee Co., Wis. My commission expires 2/17/35.

[fol. 79] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF B. F. KUEHLHORN—Filed Sept. 14, 1934

STATE OF WISCONSIN,
Milwaukee County, ss:

B. F. Kuehlhorn, being first duly sworn on oath deposes and says that he is an officer of the Northern Building & Loan Association, a corporation; to wit: its Secretary, and that at the Special Meeting held by the stockholders of said Association called for the purpose of conversion of said Association into a Federal Savings and Loan Association, the actual number of shares represented at said meeting, either in person or by proxy was 23,302 shares, and that 23,291 shares voted in favor of the adoption of said resolution and 11 shares voted against the adoption of said resolution, and that the total outstanding stock of said association on the date of said stockholders meeting was 35,308 [fol. 80] shares.

B. F. Kuehlhorn. Subscribed and sworn to before me this 12th day of September, 1934. John Schlintz, Notary Public, Milwaukee Co., Wis.

[fol. 81] Received a copy this 14th day of September, 1934. J. E. Finnegan, Atty. Gen.; John E. Martin, Ass't. Atty. Gen.; Benjamin Poss, of Counsel, by J. P. Brazy.

[fols. 82 & 83] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted.]

STIPULATION AS TO HEARING, ETC.—Filed Sept. 12, 1934

It is hereby stipulated by and between the parties to this action through their respective counsel that issue in

this action on plaintiff's complaint, defendants' answer and counterclaim and amended answer and counterclaim, and plaintiff's reply thereto, has been joined; that no issue of fact is presented and that upon the hearing held in Court on August 7th, 1934 the Court may render judgment upon the merits of this cause as contained in the pleadings on file herein and without the taking of any testimony.

Dated August 7th, 1934.

John H. Schlintz, Attorney for Plaintiff. J. E. Finnegan, Atty. Gen.; J. E. Martin, Asst. Atty. Gen.; Benj. Poss of Counsel, Attorneys for Defendants. By J. P. Brazy.

[fol. 84] In Circuit Court of Milwaukee County

Branch 8

Reliance Building & Loan Association, Plaintiff,

vs.

Peter A. Cleary, et al., Defendants

Northern Building & Loan Association, Plaintiff,

vs.

Peter A. Cleary, et al., Defendants

[File endorsement omitted.]

Opinion—Filed Sept. 11, 1934

The two plaintiff Associations seek to convert themselves into Federal Savings & Loan Associations pursuant to Section 5 (i) of the Act of Congress known as the Home Owners' Loan Act of 1933 as amended. They brought these actions to restrain the defendants (who are members of the Banking Commission and Supervisor of Building and Loan Associations of Wisconsin) from interfering with such proposed conversion.

Arguments and briefs have been submitted upon motions made by each side to restrain the other.

The questions involved will be stated in the headings and will be dealt with in this opinion.

I. Does the language of Sec. 5(i) of the Home Owners' Loan Act of 1933, as amended, imply necessity of legal consent by the State to the proposed conversion of State building and loan associations into Federal savings and loan associations?

[fol. 85] This question is presented initially because, if answered in the affirmative, consideration of the constitutionality of the Act becomes unnecessary.

Sec. 5(i), as amended in 1934, provides:

"Any member of the Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

This is an amendment of the section as it was originally enacted in which the pertinent language used was: "upon a vote of its stockholders as provided by the law under which it operates." The rules and regulations adopted by the Federal Home Loan Bank Board for Federal savings and loan associations were enacted prior to the 1934 amendment of the statute. In those rules it was provided that "conversion will not be approved until a vote is obtained which * * * is a vote which under the State law authorizes conversion." The amendment of the Act of Congress on the specific subject of the vote required indicates an intention to effectuate the conversion regardless of any provision of a State law on the subject. The rules, of course, are superseded by the subsequent amendment of the Act. The term "legal meeting" cannot, in view of the context—as just referred to—be said to imply consent of the State to a proposed conversion. Those words can have reference only to the legal requirements precedent to calling and holding a meeting. Although the consent of the State to the proposed conversion be not obtained, the meeting itself is not illegal if called and held pursuant to the laws or rules governing the procedure of holding a meeting.

Since the question (in the heading) must therefore be [fol. 86] answered negatively, it becomes necessary to consider the validity of the Act of Congress authorizing the incorporation of "Federal savings and loan associations", and particularly, the conversion of State associations into Federal associations. .(Secs. 5(a) and 5(i) of Home Owners' Loan Act of 1933 as amended.)

II. Has Congress the power to incorporate savings and loan associations?

It is conclusively established by the highest judicial authority that Congress possesses the power to incorporate banks to provide means deemed appropriate by Congress to carry out the sovereign powers enumerated in Article I, Section 8, of the United States Constitution. The Supreme Court of the United States has affirmed this power with respect to the establishment of the National Bank of the United States in the early part of the last century, the establishment of a national banking system after the Civil War, and the more recent establishment of Federal Land Banks and Joint Stock Land Banks. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Osborn v. Bank of United States, 9 Wheat, 738, 6 L. Ed. 204; Farmers & Merchants Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L. Ed. 577.

The power of Congress is held to extend not merely to the establishment of the bank, and the granting to it of authority to serve governmental purposes, but the granting of such additional functions as are appropriate and relevant to a successful banking business, even though they are of a private nature, and considered isolatedly, are not within the implied power of Congress. Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204; First National Bank v. Fellows, 244 U. S. 416, 61 L. Ed. 1233, 1237; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L. Ed. 577, 589.
[fol. 87] A principal consideration upon which Chief Justice Marshall rested the authority to create the bank was the fact that its formation was required by the fiscal operations of the government. Id. p. 589.

The title of the Home Owners' Loan Act of 1933 includes, among other language, the words, "to increase the market for obligations of the United States." The provisions for the Federal savings and loan associations are contained in

Sec. 5 of the Act. Sec. 5 (k) permits such associations to be employed as fiscal agents of the Government. But neither the title nor any express designation of purpose is all inclusive. The purpose of this Act, as well as the Federal Home Loan Bank Act of July 22, 1932, and the Federal Lank Bank Act, is apparent throughout their content and from the debates in public committee hearings and in Congress. The ultimate purpose of these Acts is fundamentally the same—the rehabilitation of the people of an entire nation suffering from the most calamitous burden of debt, contraction of credit and economic and financial depression known in American history. Congress, by its expressions, apparently believed that government-supervised institutions making long time loans on homes and receiving savings in exchange for the issue of income shares of stock can be useful in increasing the market for government obligations and in being employed as fiscal agents for the government—even though its ultimate purpose was to stimulate a return of wholesome economic conditions. If the act carries out a legitimate end within the scope of the Constitution by appropriate means the motives of Congress cannot be questioned. Smith v. Kansas City Title & Trust Co., 65 L. Ed., p. 589. Congress having found it necessary to create this fiscal agency, and the power existing to do that, the extent of the actual exercise of the authority granted does not operate to restrict or impair the power. Id., p. 589.

[fol. 88] It is said by defendants' counsel that Congress went too far; that the same motive logically would lead to the control by the government of every conceivable business institution because of the relation of the latter to the banks. As stated by Marshall: "All must admit that the powers of the government are limited, and that its limits are not to be transcended." McCulloch v. Maryland, 4 L. Ed. p. 605. Whatever may be said against the extension of the power to the field suggested, yet in view of the character of savings and loan associations, and their universal use as a reservoir for the money savings of the people, it cannot be said to be clear that the Congress has in this instance transcended the limits of its powers granted in the Constitution.

The Home Owners' Loan Act, in which the Federal savings and loan associations are created, is but the sequel

of its predecessors. It is the complement of the Home Loan Bank Act of 1932. It is a link in the chain of consistent legislation.

Summarizing Chief Justice Marshall's opinion in McCulloch v. Maryland, Chief Justice White in First National Bank v. Fellows, 244 U. S. 416, 61 L. Ed. 1233, says: "In terms it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for." Id. 1237.

When one considers the breadth of the scope of Congressional power as disclosed by the facts and the decision in Smith v. Kansas City T. & T. Co., 255 U. S. 180, 65 L. Ed. [fol. 89] 577, pertaining to the creation of Federal Land Banks and Joint Stock Land Banks, dealing with long time agricultural loans, it cannot be said that the present statute is plainly unconstitutional. It was said in that decision: "A bank is a moneyed institution to facilitate the borrowing, lending and caring for money. But whether technically banks or not, these organizations may serve the governmental purposes declared by Congress in their creation." Id. (65 L. Ed.) 589, 590.

In the light of the decisions cited it cannot be said that there is more than a fair doubt as to the asserted power of Congress extending to the creation of Federal savings and loan associations. "The question whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. pp. 651-652. Many courts, including our own Supreme Court, have said that a statute must be presumed to be constitutional unless its repugnancy to the Constitution appears "beyond a reasonable doubt." 6 R. C. L. p. 99; R. C. L. Perm. Supp. "Const. Law," 98; Lawrence University v. Outagamie County, 150 Wis. 244, 246; Peterson v. Widule, 157 Wis. 641, 647; State ex rel. Carnation M. P. Co. v. Emery, 178 Wis. 147, 151; State ex rel. Blockwitz v. Diehl, 198 Wis. 326, 331; Blaisdell v. Home Building & Loan Association, 86 A. L. R. 1507, 1513.

III. Has Congress the power to authorize the conversion of State building and loan associations into Federal savings and loan associations without consent of the State?

Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168 was an action commenced by a receiver to enforce the liability of a stockholder of the Bank of New Orleans, a Louisiana banking [fol. 90] corporation, which had converted itself into the New Orleans National Banking Association pursuant to the Banking Act of Congress of June 3, 1864. The defendant filed three pleas in abatement the second of which was to the effect that the Bank of New Orleans had no power by its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States. The court said:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the 44th Section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally." Id. (24 L. Ed. p. 169.)

The doctrine thus announced has never been overruled. It is referred to with apparent approval in Ex parte Worcester County National Bank 279 U. S. 347, 73 L. Ed. 733, 737.

By virtue of that authority it must therefore be held that there is no necessity for a state enabling act in order that building and loan associations organized under Wisconsin Statutes may convert themselves into Federal savings and loan associations.

IV. Manner of exercise of act of conversion.

So long as the doctrine of Casey v. Galli (Supra) stands unmodified by the Supreme Court of the United States it cannot be held here that the voluntary conversion of a State association into a Federal association, created by Congress in the exercise of a power within the scope of the Federal Constitution, infringes upon the just authority of the State, even though the State withholds its consent.

But while the consent of the State is not necessary under the rule of the Casey Case the conversion by the State association can be effectuated only by its voluntary action. That can be achieved by an expression of the will of the [fol. 91] State association in the only manner possible for it to do so; that is, it must be governed by the provisions of its charter or the State law applicable to its method of expressing its will. Congress may employ State corporations with their consent as instrumentalities of the United States. Westfall v. U. S. 274 U. S. 256, 71 L. Ed. 1036, 1037. A provision in an act of Congress by which a smaller percentage of stock in a State corporation is fixed to procure corporate action than the percentage required by the charter of such association could not be sustained, for the consent of the State association would not thus be obtained. Commonwealth v. First National Bank & Trust Co., 154 Atl. (Pa. 379, 380, holding that only by obedience to the prescriptions of the statute of the State can a corporation called into being by the State be dissolved. Compare Fed. Land Bank v. Crookston T. Co. (Minn.) 230 N. W. 797; Northern Sec. Co. v. U. S. 193 U. S 197, 48 L. Ed. 679, 704.

Is the conversion requirement of 51% of the votes cast at a legal meeting contained in Sec. 5(i) of the Home Owners' Loan Act in conflict with any provision of the Wisconsin Statutes?

Sec. 181.03, Wis. Stats., provides for dissolution of domestic corporations by a vote of two-thirds of the stock. Sec. 215.36 (1) (as amended Feb. 2, 1932) provides for liquidation or dissolution of building and loan associations by a two-thirds vote of all its outstanding authorized capital stock. Sec. 215.335 provides that any building and loan association may absorb any other association located in the same county. It also provides that when two associations propose to consolidate, they must have the approval of the Commissioner of Banking and a majority vote of the board of directors of each such association, and that such proposed consolidation shall be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its shares outstanding.

[fol. 92] If any of these provisions are applicable to conversion into Federal Savings and Loan Associations under

the Home Owners' Loan Act, then such applicable provision could not be validly overridden by the Act of Congress.

In the opinion of the writer the mentioned statutory provisions of Wisconsin are not so applicable. Those provisions do not relate to conversion into Federal associations, As to that the Wisconsin statutes are silent. It may be noted, for comparative purposes, that a Wisconsin statute provides for the reorganization of a State bank as a national bank. No provision as to the vote required is contained in that statute. Sec. 221.21. Hence the Federal statute, as to the vote required, would apply. Since the State's consent to conversion is not necessary, the conversion of a State building and loan association may be effected by the 51% vote fixed by Sec. 5 (i) of the Home Owners' Loan Act, unless it can be said that such conversion into a Federal association works a dissolution of and extinguishes the corporate identity of the State association. It appears, however, to be well established that the reorganization of a State bank as a national bank does not destroy its identity or corporate existence. Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. Ed. 841, 843; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 36 L. Ed. 162, 164; Commonwealth v. First Nat. Bank & T. Co., 154 Atl. (Pa.) 379, 381 ("the conversion • • • is merely a change of title and governmental supervision"); 3 Ruling Case Law 658 ("Banks" 288); 15 A. L. R. 1133 Note.

While it is thus here concluded that no statute of this State is contravened by the provision in Sec. 5 (i) of the Home Owners' Loan Act as to the vote required for conversion, yet if it were otherwise—that is, if a two-thirds vote of all outstanding shares was required—the actual [fol. 93] vote disclosed that more than two-thirds of such shares has in the case of each of the plaintiff associations been cast in favor of conversion, as the court has been informed. These votes were taken, with the court's permission, since the hearing of the motions herein, the validity of the action taken being dependent upon the decision herein. Verified statements of the proceedings had wherein such votes were taken may be filed as parts of the record herein.

Conclusion

The arguments and briefs of counsel have been very thorough and helpful to the court. By way of a single exception, however, it may not be amiss to add that arguments of a political nature indulged in in the last portion of the main brief of plaintiffs' counsel are inept. So also are the assertions of such counsel that in order for a court to declare a law invalid it must find that the work of the lawmakers was "insincere, frivolous and childish." If that were true, then it would have to be admitted that the Supreme Court of the United States has on many occasions so designated the Acts of Congress. Most earnest and sincere Congressmen have frequently enacted unconstitutional measures. The questions in this case are close and have given the court great concern. It would be well to bear in mind the words of the great Marshall in writing of the division in President Washington's Cabinet respecting the power of Congress to create the first national bank of the United States:

"The liberal mind which can review them (the arguments) without prejudice, will charge neither the supporters nor the opponents of the bill with insincerity, nor with being actuated by motives which might not have been avowed."

(Marshall's Life of Washington, Vol. IV, p. 396.)

The plaintiffs' motions for a restraining order, to prevent the defendants from interfering with the proposed [fol. 94] conversion, are granted. The defendants' motions to prevent the plaintiffs from taking further steps to convert their Associations into Federal Savings & Loan Associations, are denied.

Charles L. Aarons, Circuit Judge.

Dated September 11th, 1934.

[fol. 95] In Circuit Court of Milwaukee County

[Title omitted]

[File endorsements omitted.]

Order for Judgment—Filed Sept. 12, 1934

On the 25th day of July, 1934 plaintiff obtained an order from this Court directing the defendants to show cause

before this Court on September 10, 1934 why the relief prayed for in plaintiff's complaint on file herein should not be granted. Said order to show cause also contained an ex parte order restraining the defendants from taking possession of the assets of the plaintiff and from interfering with the officers, directors and stockholders of the plaintiff in the conduct of any meeting or meetings called for the purpose of considering corporate business and more particularly the conversion of said plaintiff into a federal savings and loan association.

On July 27, 1934 the defendants served a notice on the plaintiff stating that on August 4, 1934 defendants would move for an order restraining and enjoining the plaintiffs, its officers, directors, stockholders, agents and employes, pending the final determination of this action, from taking any other or further steps in its attempt to convert into a federal savings and loan association, and vacating the temporary restraining order contained in plaintiff's order to show cause.

[fols. 96 & 97] The plaintiff's order to show cause and the defendants' motion came on to be heard on August 7, 1934. There being no issues of fact in the action, the parties through their respective counsel stipulated in open court at the said hearing with the consent of the Court that said hearing be the trial of the action and that the Court enter judgment upon the merits of the cause without the taking of testimony herein.

After hearing the arguments of counsel and being fully advised in the premises and pursuant to the written decision on file herein,

It is ordered that judgment be entered as follows:

1. Declaring that the plaintiff association has the right and power to convert into a federal savings and loan association, and that the Acts of Congress so providing, are valid and constitutional.

2. Declaring that the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association.

3. Restraining and enjoining the defendants, their agents, servants and employees from taking possession of the plaintiff association or interfering in any way with the

proposed conversion of the plaintiff into a federal savings and loan association.

4. Dismissing the defendants' counterclaim on the merits.

Dated this 12th day of September, 1934.

By the Court:

Chas. L. Aarons, Circuit Judge.

[fols. 98 & 99] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[File endorsements omitted.]

NORTHERN BUILDING AND LOAN ASSOCIATION, a Corporation, Plaintiff,

versus

PETER A. CLEARY et al., Defendants

JUDGMENT—Filed Sept. 12, 1934

This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association has the right and power to convert into a federal savings and loan association and that the Acts of Congress so providing, are valid and constitutional.

(2) That the defendants have no right or authority to take possession of the plaintiff association to prevent its conversion into a federal savings and loan association

(3) That the defendants, their agents, servants and employees be and they hereby are restrained and enjoined from taking possession of the plaintiff association or interfering in any way with the proposed conversion of the plaintiff into a federal savings and loan association.

(4) That the defendants' counterclaim be and the same hereby is dismissed on its merits.

Dated this 12th day of September, A. D. 1934.

By the Court:

Jas. L. McCormick, Clerk; By Harold H. Gruettner, Deputy Clerk.

[fol. 100] In Circuit Court of Milwaukee County

[Title omitted]

[File endorsements omitted]

Notice of Appeal—Filed Sept. 12, 1934

Please take notice that Peter A. Cleary, S. N. Schafer and H. F. Ibach as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, the defendants in this action, hereby appeal to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this action in the Circuit Court for the County of Milwaukee on the 12th day of September, A. D. 1934 in favor of the plaintiff and against the defendants and from the whole of said judgment. A copy of said judgment is hereto annexed.

Dated September 12, A. D. 1934.

J. E. Finnegan, Attorney General; John E. Martin, Asst. Attorney General, Attorneys for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel.

To John H. Schlintz, Esq., Attorney for Plaintiff, 416 Caswell Block, 152 W. Wisconsin Avenue, Milwaukee, Wisconsin, and to the Clerk of the Circuit Court for Milwaukee County.

[fols. 101 & 102] Judgment omitted. Printed side page, 98 ante.

[fol. 103] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 104] [File endorsement omitted.]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1934

Nos. 212, 214, 215

STATE EX REL PETER A. CLEARY et al., Plaintiffs,

v.

HOPKINS STREET BLDG. & LOAN ASS'N, a Wis. Corporation et al., Defendants

RELIANCE BLDG. & LOAN ASS'N, a Corporation, Respondent

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants

NORTHERN BLDG. & LOAN ASS'N, a Corporation, Respondent.

v.

PETER A. CLEARY et al., as Banking Commission et al., Appellants

Appeal from two judgments of the circuit court for Milwaukee county: Charles L. Aarons, Circuit Judge. Reversed.

An original action commenced pursuant to leave granted by this court. Writ granted.

OPINION—Filed Dec. 11, 1934

The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each brought its action to restrain the banking commission and supervisor of building and loan asso- [fol. 105] ciations from interfering with the plaintiffs in their attempt to convert their association from a state building and loan association into a federal savings and loan association. On September 14, 1934, the banking commission, with leave of this court, began an original action against the Hopkins Street Bldg. & Loan Ass'n to restrain the association, its officers and agents from operating as a federal savings and loan association, to have defendant's attempted conversion into such an association declared null and void, and to compel the officers of said association to

operate it as a Wisconsin building and loan association or to wind up its affairs as such an association in the manner provided by the statutes of this state, on the ground that the Hopkins Street Bldg. & Loan Ass'n is under the jurisdiction of the banking commission of the state of Wisconsin. The cases of Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n were tried together in the circuit court for Milwaukee county before the court without a jury. The petition for leave to commence the original action in this court stands as the complaint. There was an appearance in this action by all of the named defendants and for "Hopkins Federal Savings & Loan Ass'n, a national corporation, organized pursuant to the acts of congress and the laws of the United States of America, and successor by conversion to Hopkins Street Bldg. & Loan Ass'n." An answer was interposed by the Hopkins Federal Savings & Loan Ass'n describing the proceedings taken and alleging the legality and sufficiency thereof in the matter of converting that association into a federal savings and loan association, a corporation under the government of the United States, and praying for a rule that the bank-[fol. 106] ing commission of the state of Wisconsin has no jurisdiction of the defendant.

[fol. 107] FAIRCHILD, J.

The Reliance Bldg. & Loan Ann'n and the Northern Bldg. & Loan Ass'n respondents on this appeal, and the Hopkins Street Bldg. & Loan Ass'n defendant in the original action here, are each Wisconsin corporations organized under the provisions of ch. 215, Stats. This chapter places the control and supervision of building and loan associations under the banking commission and authorizes the commission to take possession of and liquidate such an association when it shall appear that it is violating its charter or any of the laws of the state.

On July 22, 1932, Congress enacted the Federal Home Loan Bank Act. By virtue of the provisions of this act, state building and loan associations were eligible to membership and, under certain conditions and restrictions, entitled to borrow from a Federal Home Loan Bank. The Wisconsin legislature, on July 10, 1933, by its enactment of sec. 215.07 (8), Stats., authorized Wisconsin building and loan associations, with the approval of the commissioner

of banking, to become members of and borrowers from the Federal Home Loan Bank. Each of the building and loan associations here involved became members of the Federal Home Loan Bank. On June 13, 1933, there was enacted by the congress of the United States the Home Owners' Loan Act section 5 of which authorizes the Federal Home Loan Bank Board to provide for the organization of associations to be known as Federal Savings & Loan Ass'ns and to issue charters therefor; and on April 27, 1934, by amendment to the Home Owners' Loan Act, it was provided:

"Sec. 5 (i) Any member of the Federal Home Loan Bank may convert itself into a Federal Savings & Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to [fol. 108] such rules and regulations as the board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this act."

Following the passage of the amendment just referred to and without further consent or authority of the state, application was made by the three associations to the Federal Home Loan Bank Board for permission to convert themselves into federal savings and loan associations under the provisions of sec. 5 (i) of the Home Owners' Loan Act of 1933 as amended. In each case the Federal Home Loan Bank Board granted the permission. With reference to the Hopkins Street Bldg. & Loan Ass'n the banking commission undertook to prevent the proposed conversion but in compliance with the order of the circuit court for Milwaukee county, desisted from such attempt and the association accepted a charter from the Federal Home Loan Bank Board and has since held itself out to be a savings and loan association free from the jurisdiction and control of the banking commission of this state. An original action is brought against the association seeking to have the attempted conversion declared null, void, and of no effect. The Reliance Bldg. & Loan Ass'n and the Northern Bldg. & Loan Ass'n each began an action to restrain the banking commission from interfering with its pro-

posed conversion. In those cases the banking commission interposed counter-claims praying for declaratory relief similar to that sought in the original action in this court and an injunctional order to prevent the proposed conversion. This is briefly a description of the record in the three matters and they present identical questions. The learned judge who tried the two cases in which judgment [fol. 109] was entered below was of the opinion that congress had power to incorporate federal savings and loan associations; that the language of sec. 5 (i) of the Home Owners' Loan Act of 1933 as amended April 27, 1934, did not imply the necessity of consent by the state to the proposed conversion of a state loan association into a federal loan association; and that congress had the power to authorize the conversion without the consent of the state.

The cause was first submitted upon arguments and briefs dealing to a large extent with the questions of whether congress has power to incorporate federal savings and loan associations and as to the power of congress to supersede the authority of the state over building and loan associations created by the state and to invest such corporations with corporate power to transmute themselves into federal savings and loan associations. We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the state of power over corporate charters. Since then we have again examined the questions raised. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the state of Wisconsin, to convert itself into a savings and loan association under the federal act. While the other questions are well within the limits of proper discussion as outlined by the issues, it is worthy of emphasis that all other questions are incidental to this controlling question and such reference to them as may be made is in aid of the determination of the actual corporate powers of a state organized building and loan association to accomplish transmutation. This being true, we will therefore consider whether the respondents, by reason of provi- [fol. 110] sions in their charters of the laws of their creator, have any such power.

The respondents were created by the state of Wisconsin at a time when without question the state had plenary power to create and to control the powers of these corporations. They are not banks; they have not banking powers or privileges under our state laws. Leahy v. National Bldg. & Loan Ass'n. 100 Wis. 555, 76 N. W. 625; Julien v. Model Bldg. & Investment Ass'n. 116 Wis. 79, 92 N. W. 561; First Nat. Bank v. County of Dawson, 66 Mont. 321, — Pac. —; Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, — So. —; Hoenig v. Huntington Nat. Bank of Columbus, 59 Fed. (2d) 479, 48 L. ed. 560; Mercantile Nat. Bank v. Hubbard, 99 Fed. 465, Ch. 215 Stats. 1933. Their charters do not authorize them to divest themselves of the corporate charter conferred upon them by the laws of the state. They have only the powers emanating from the state. These powers must be used as prescribed by the state and with due consideration for the contractual rights between the stockholders and the corporation existing by reason of state law and the charter of the corporation. Under the declared law of the state, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign state by accepting a charter from any other sovereign government. Our constitution, sec. 1 Article XI provides:

"All general laws or special acts, enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage."

The people of our state thereby vested a reserve power over charters of corporations in the legislature. The idea that any other body or sovereign, a stranger to the contract, or that the corporation alone may deprive the state [fol. 111] of this power is foreign to the plain meaning of the language used in the constitution with relation to that subject. This provision of our constitution and similar provisions to be found in the constitutions of other states were adopted for the purpose of overcoming in part the effect of the decision of the United States Supreme Court in Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 4 L. Ed. 629. In that case it was held that a corporation created by a state became a separate corporate entity

and subject to control by the state to the extent only that citizens of the state were subject to control under the constitution; that any amendment, alteration or repeal of its charter which withdrew or impaired the obligations of the charter was in violation of section 10 Article I of the constitution of the United States which provides: "No state shall • • • pass any • • • law impairing the obligations of contracts."

The nature of the power expressly reserved by the Wisconsin constitutional provision has been dealt with in many case both in state courts and in the courts of the United States. A reference to these cases shows the extent of this power and its proper use in controlling charters issued to corporations. In West Wisconsin R. R. Co. v. Board of Supervisors of Trempealeau Co., 35 Wis. 257, 270, referring to sec. 1, Article XI of the constitution, the court said:

"The object and historical origin of the provision in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over corporate franchises, rights and privileges which it might grant—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case."

It was also considered in another celebrated case, The [fol. 112] Attorney General v. Railroad Companies, 35 Wis. 425, 574, where the court said:

"And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule of the Dartmouth College case, as applied to corporations, never had a place in this state, never was the law here. The State emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land.

"Subject to this reserved right, and under the rule in the Dartmouth College case, charters of private corporations are contracts. • • • The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the state that the

franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the state, which is their creator, *durante bene placito.*

"This is a question of state law, not of federal law. We give full scope to the federal constitution as interpreted by the federal courts, but we stand clearly outside of both. This question could be brought within the Dartmouth College rule, not by interpretation of the federal constitution, but by interpretation of the state constitution only. That is our function. We accept the construction of the federal constitution as the federal courts give it. But we give construction to our own constitution for ourselves. And there we might well rest."

The court pointed out that the exercise of the reserve power had been sanctioned by the federal and other state courts and cited cases.

While the federal constitution contains no power reserving to congress the right to amend, alter or modify the charters of corporations created by it, congress has in numerous instances reserved the power in the act by which corporations were created. In Union Pacific R. R. Co. v. United States, 99 U. S. 700, 25 L. Ed. 496, the Supreme Court of the United States had under consideration the act of Congress incorporating the Union Pacific Railroad Company, which act contained the following reservation: "Congress may at any time alter, amend or repeal this act." Considering this in connection with a former act of congress, the court said:

"We are of the opinion that congress not only retains, [fol. 113] but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in Miller v. The State, 15 Wall. 498, 21 L. ed. 104, 'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the

grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets.' "

See also Close v. Greenwood Cemetery, 107 U. S. 466, 476, — L. Ed. —; Tomlinson v. Jessup, 82 U. S. 454, 21 L. Ed. 204.

In Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 105 N. W. 1035, a law was held unconstitutional under which a mutual insurance company attempted to convert itself into a stock company pursuant to an act of the legislature of the state of Wisconsin permitting it to do so at the option of two-thirds of its existing policy holders, representing not less than one-half of its outstanding insurance. It was sought to sustain this action of the legislature under sec. 1 of Article XI as an exercise of the power thereby reserved. It was argued that since the legislature had power to provide for the dissolution of a corporation, it might also provide for the disposition of its assets to a successor corporation. The court said:

"The right of the corporation to hold its property in harmony with that situation, and the rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the state constitution as regards the passage of laws impairing the obligations of contract, sec. 12, Art. I, Const. of Wis., and that of the national constitution as regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws. XIVth Amend. U. S. Const. * * * The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members in violation of the corporate charter rights of the former corpora-
[fol. 114] tion, and in defiance of the wishes of such of its members as do not choose to consent thereto."

The matter was further dealt with in State ex rel. Northern Pacific R. Co. v. Railroad Comm., 140 Wis. 145, 157, 121 N. W. 919. In that case the court said:

"The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control

over corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall not be taken for public use without compensation. Moreover, the power to alter or amend is a reserve power in the interest of the state to modify or repeal its own contract with the corporation. Tomlinson v. Jessup, 82 U. S. 454; State v. C. & N. W. R. Co. 128 Wis. 449, 108 N. W. 594."

There can be no doubt but that it was intended by the framers of the constitution to reserve in the state the power to alter or repeal the charter of any corporation created by the legislature. The constitution having thus limited the power of the legislature, it would seem to follow that the legislature is without authority to divest itself of the power reserved to it by the constitution. But if it should be held that the legislature has such power, it is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon non consenting members of the corporation. A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder. Martin Orchard Co. v. Fruit Growers C. Co. 203 Wis. 97, 233 N. W. 603; Huber v. Martin, supra; 7 Ruling Case Law, p. 97. And there is a fundamental and material difference between being a member of a building and loan association over which the representatives chosen by the people of this state have the reserve power of control and being a member of one created [fol. 115] by the legislative body of a different sovereign power.

Our legislature has enacted laws covering the entire subject matter of control of these associations and has molded them to the needs of the communities, regulating the manner by which they may come into existence and continue in business. Ch. 215, Stats., 1933, expressly regulates the powers conferred upon them. If it be urged that sec. 215.07 (8), Stats. reading:

"With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provision in subsection (2) of section 215.07 as to the one-year time

limit and as to the amount that may be borrowed, to the contrary notwithstanding."

authorizes a building and loan association organized under the provisions of chapter 215 to divest itself of its charter as a state corporation, the answer is that sec. 215.07(8) confers no such power nor was it intended to confer such power. Sec. 215.07(2), Stats. 1933, provides:

"To borrow money for temporary purposes, not inconsistent with the objects of the association, and issue its evidences of indebtedness therefor, but for no longer term than one year and not exceeding in the aggregate amount one-fifth of the assets on hand."

Sec. 215.07(8) is a provision authorizing building and loan associations, as to loans made from the federal home loan bank, to waive the limitation upon the power to borrow found in sec. 215.07(2). It does not attempt to deal with the power of a building and loan association to sever the ties which bind it to the state from which it derives its charter. To hold that such power was conferred by sec. 215.07(8) would be clear judicial legislation in a matter vitally important to the state involving large questions of public policy. Since respondents' charters do not provide for transmutation and no authority emanating from the [fol. 116] state of Wisconsin accords them the privilege, or attempts to confer corporate power upon them to transmute, two questions are suggested. First, has congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the state and actually to invest respondents with corporate power essential to a transmutation? Second, if it be found that it was the purpose of congress by that act thus to increase respondents' corporate powers, then, has congress the power to accomplish this result? We are not treating specifically the second question for reasons already set forth.

As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the state's right to charter corporations and retain control over them under the state constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as state corporations. Nor does that act attempt to invest the state corporations with any power not

granted to them by the state which created them. The act was intended to be administered in forty eight states, and applies to corporations operating under different degrees of state control and with different powers. It does not purport to invest the various state corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. If a state, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a federal corporation upon a vote of 51 per centum of the stockholders. Nor would a state statute [fol. 117] providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the federal act may readily be interpreted as the manner of consenting by the membership which the federal government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things; first, it would enable a building and loan association to escape from regulatory control reserved by the state, and second, it would divest stockholders of their rights in the corporation under state law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the state and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. Huber v. Martin, supra.

Any method under which a state association seeks to transfer itself into a federal group without consideration of the contractual relation existing between it and the state would seem to be ineffective. It has only the powers emanating from the state and these must be used as prescribed by the state with due consideration for the contractual rights between stockholders and the association existing by reason of state laws and the charter of the corporation.

We will not review all the cases cited by respondents in support of the claim of right to transmutation, but our

attention is called to Casey v. Galli, 94 U. S. 673, 24 L. Ed. [fol. 118] 168, and particular emphasis is placed on the statement in the opinion: "It was as competent for congress to authorize the transmutation as to create such institutions originally." A receiver of a national bank, which by an act of congress had been converted from a state bank without an enabling act by the state, brought suit against a stockholder upon his stockholder's liability. A plea in abatement based upon the failure to obtain the consent of the state was held bad. That the quoted words were intended to be a complete statement of a rule of law to the exclusion of all qualifications may well be doubted, but even if such was the intention, we cannot recognize the result in that case as determining that the federal government may invade the jurisdiction of the state government and appropriate for its own purposes the agencies devised by the state for the welfare of its citizens or interfere against the wish of the state with respect to contracts existing between the state and corporations of its own creation. Whatever power congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to other domestic corporations organized under state law for the state's purposes in providing for the welfare of its citizens. It ought also to be said that aside from the fact that the Home Owners' Loan Act does not deal with the general subject of banking, as did the law involved in the Galli case, it is otherwise quite different from the the statute there involved and construed. That act authorized state banks to become national banks. 13 U. S. Stats. at Large, 112, 113, provided "that any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national asso- [fol. 119] ciation under its provisions • • • ". It is specifically provided that "the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act." A majority of the directors are thereafter specifically given the power to execute all

necessary papers essential to a perfection of the organization as a national association. This act constituted an unmistakable investiture of corporate powers upon state banks. If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will be permitted, so far as the federal government is concerned, without purporting to increase corporate powers of state corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin, by power reserved in its constitution, has retained control over corporations organized under its laws, and since the state undoubtably had plenary powers, both of organization and control, prior to this act, it cannot be ousted by any act of congress from these powers; that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no applica-[fol. 120] tion; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders would be an impairment of the contract rights of stockholders in a Wisconsin corporation. That these are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of congress to interfere with the control of corporations organized under state laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find.

Respondents call our attention to Ex Parte Worcester National Bank, 279 U. S. 347. From the opinion of the United States Supreme Court in that case, it appears that the Supreme Judicial Court of Massachusetts held that under the constitution and laws of that state, a state bank could change its organization to that of a federal bank without any authority given by the state to make the change. That decision rests definitely upon a determination by the Supreme Judicial Court of Massachusetts of a question of

state law. We shall not attempt an analysis of the decision of the Massachusetts court. The question before us is one of state law and in answering that question we must proceed in accordance with the existing law of the state of Wisconsin.

It is our conclusion that respondents have no power to transmute, and that any purported efforts in that direction are void for want of this power. It is assumed that if the act of congress is to be given the construction contended for by respondents, it results not in the creation of a new [fol. 121] corporation but in the transfer of its allegiance by the state corporation, from the sovereignty of its creation, to the federal government. It has not been thought necessary to consider the possibility that congress, by this act, has created a new corporation, because in that event, there being no provision in the charter of the original corporation or in the laws of Wisconsin for a transfer of its property, the corporation would find itself a naked legal entity without any means of carrying out the purposes of the transfer.

By the Court:

Judgments entered in the circuit court are reversed, causes remanded with directions to enter judgment in favor of the banking commission on its counter-claim. In the original action in this court, let the writ issue.

[fol. 122] In Supreme Court of Wisconsin

Northern Building and Loan Association, a Corporation, Respondent,

vs.

Peter A. Cleary, S. N. Schafer and H. F. Ibach as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Appellants.

Appeal from Circuit Court Milwaukee County, State of Wisconsin

Judgment—Dec. 11, 1934

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was ar-

gued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent — taxed at the sum of —.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in favor of the banking commission on its counter-claim.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 123] IN SUPREME COURT OF WISCONSIN

[Title omitted]

[File endorsement omitted]

NOTICE OF MOTION FOR REHEARING—Filed Dec. 20, 1934

Please take notice that the plaintiff, Northern Building & Loan Association, a corporation, above named, is filing with the Clerk of the above named Court, a motion for rehearing, a copy of which is hereto annexed.

Dated December 18, 1934.

John H. Schlintz, Lyman W. Sherwood, of Counsel.

To J. E. Finnegan, Attorney General; John E. Martin, Assistant Attorney; Benjamin Poss, Attorney for Defendants; Joseph P. Brazy of Counsel.

[fol. 124] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed Dec. 20, 1934

Now comes, Northern Building & Loan Association, a corporation, plaintiff herein, by its respective undersigned at-

torney for record herein, and move for a rehearing in the above entitled action.

Dated December 18th 1934.

John H. Schlintz, Attorney for plaintiff, Lyman W. Sherwood of Counsel.

[fol. 125] Rehearing

Received a copy December 18, 1934.

Benjamin Poss, Special of Counsel; J. E. Finnegan, Atty. Gen.; John E. Martin, Ass't Atty. Gen.; By Ben. Poss

[File endorsement omitted]

[fol. 125-a] In Supreme Court of Wisconsin

[Title omitted]

Order Denying Motion for Rehearing—Feb. 5, 1935

The Court being now sufficiently advised of and concerning the motion of the said respondent for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied.

[fols. 126 & 127] In Circuit Court of Milwaukee County

[Title omitted]

[File endorsement omitted]

Notice of Remittitur—Filed March 9, 1935

To John H. Schlintz,
416 Caswell Block,
Milwaukee, Wisconsin.

You will please take notice that the remittitur of the Supreme Court of the State of Wisconsin, in the above entitled action was received, entered of record and duly filed

in the Office of the Clerk of the Circuit Court of Milwaukee County, Wisconsin, on the 5th day of March, 1935.

Dated this 7th day of March, 1935.

J. E. Finnegan, Attorney General, Attorney for Defendants. Benjamin Poss, Joseph P. Brazy, Of Counsel.

[fols. 128 & 129] IN CIRCUIT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted]

NOTICE OF MOTION FOR JUDGMENT ON REMITTITUR—Filed March 9, 1935

To John H. Schlintz,
Attorney for Plaintiff.

Please take notice that on the 9th day of March, 1935 at 9:00 o'clock A. M., or as soon thereafter as counsel can be heard, defendants will appear before the Calendar Branch of the above named Court in the Court House in the City and County of Milwaukee, State of Wisconsin, and move for an order for judgment in accordance with the remittitur of the Supreme Court of the State of Wisconsin, on file herein, remanding this cause with directions to reverse the judgment heretofore entered and to enter judgment in favor of the defendants on their counterclaim.

Dated at Milwaukee, Wisconsin, March 7th, 1935.

J. E. Finnegan, Attorney General, Attorney for Defendants. Benjamin Poss, Joseph P. Brazy, Of Counsel.

[fol. 130] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

[File endorsement omitted]

OBJECTIONS TO ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS—Filed March 9, 1935

Now comes the above named plaintiff, by John H. Schlintz, its attorney, and objects to the entry of the judg-

ment in favor of the defendants in the above entitled action for the reason that plaintiff is and was at all times a mutual loan and building association duly organized under and pursuant to Chapter 93 of the Revised Statutes of the State of Wisconsin for the year 1898 and Acts amendatory thereof and supplementary thereto, with its office and principal place of business in the city and County of Milwaukee, state of Wisconsin, engaged in the business of the creation and care of a mutual savings fund from payments made to it by its members, the making of loans to its members upon real estate security situated within Milwaukee County, Wisconsin, and such other security authorized by the laws of the State of Wisconsin, and the by-laws of said Association.

That the Congress of the United States of America enacted and the President of the United States of America approved the Federal Home Loan Bank Act, and that pursuant thereto and in accordance therewith the Federal Home Bank of Chicago, located in Evanston, Illinois, was duly organized and ever since said time has been and now [fol. 131] is such duly organized, existing and operating bank, that subsequently, to wit: on or about June 13, 1933, said Congress enacted and said President approved the Home Owners' Loan Act of 1933 and provided therein, among other things, for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations" and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States; that by amendment duly enacted by said Congress and approved by said President on or about April 27, 1934, said Home Owners' Loan Act of 1933 was amended, and it was provided among other things, in Section 5 (i), as amended by the 73rd Congress on April, 27, 1934, as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation

to the same extent as other associations incorporated pursuant to this Act."

That pursuant to Section 215.07, Subparagraph 8, Wisconsin Statutes, said plaintiff, on or about November 14, 1932, applied to the banking commission of the Banking Department of the State of Wisconsin for permission and authority to become a member of and borrow money from aforementioned Federal Home Loan Bank of Chicago; that on or about November 16, 1932, such permission and authority was duly issued to and received by said plaintiff from A. C. Kingston, Commissioner of Banking of the State of Wisconsin, by said defendant, Clyde P. Diggles, as Supervisor of Building and Loan Associations of Wisconsin; that pursuant to aforementioned Federal Home Loan Bank Act and to the permission and authority so granted by said Banking Commission of the State of Wisconsin, said plaintiff, on or about October 17, 1932, such plaintiff applied for [fol. 132] membership, subscribed for forty-four (44) shares of stock in, to and of said Federal Home Loan Bank Board at Washington, D. C., its official certificate of membership of said plaintiff in said bank dated as of August 11, 1933; that said plaintiff has been ever since said last mentioned date and is now a member in good standing and a stockholder in said Federal Home Loan Bank of Chicago.

That heretofore to wit: On or about March 12, 1934, said plaintiff, in accordance with the provisions of said Home Owners' Loan Act of 1933, by its duly constituted officers and directors and by proper resolution, filed its application with and made application to said Federal Home Loan Bank of Chicago for permission to convert into a Federal Savings & Loan Association; that thereupon said bank made such examination of the affairs of the plaintiff and such appraisal as might be reasonably sufficient to determine the nature, character and value of its assets and the financial condition of said plaintiff, and that on or about July 20, 1934, after such examination and appraisal, it appeared to said Federal Home Loan Bank of Chicago that conversion of said plaintiff into a Federal Savings and Loan Association was feasible and advisable, and accordingly, on said last mentioned date, said Federal Home Loan Bank of Chicago, pursuant to said Home Owners' Loan Act of 1933 as amended April 27, 1934, granted permission to said plaintiff so to convert on a one hundred per cent basis;

that said permission so to convert has been at all times since said last mentioned date and now is outstanding and of full force and effect.

That subsequently, to wit on or about July 24, 1934, said plaintiff, pursuant to said Home Owners' Loan Act of 1933, as amended, by its duly constituted Board of Directors and by proper resolution, issued and caused to be mailed to each of the stockholders of said plaintiff association, at their last given post office address, a thirty day notice in [fol. 133] writing of a special meeting of said stockholders to be held at 2964 North Eleventh Street, city and county of Milwaukee, Wisconsin, on the 14th day of August, 1934, for the purpose of considering, and determining and voting upon the recommendation and resolution of the Board of Directors of said plaintiff Association that said plaintiff convert itself into a Federal Savings and Loan Association as aforesaid.

That at a special meeting held by the stockholders of plaintiff association called for the purpose of conversion of said association into a Federal Savings and Loan Association; that the actual number of shares represented at said meeting, either in person or by proxy was 23,302 shares, and that 23,291 shares voted against the adoption of said resolution, and that the total outstanding stock of said association on the date of said stockholders' meeting was 35,308 shares, and by reason of the foregoing, judgment for the defendant in the above entitled action should be denied for the reason that the plaintiff, in accordance with the Constitution of the United States of America, the Acts of Congress, Constitution of the State of Wisconsin, and the laws of the State of Wisconsin, has the right to convert from a State building and loan association into a Federal Savings & Loan Association.

John H. Schlintz, Attorney for Plaintiff.

To Benjamin Poss, Joseph P. Brazy, of Counsel; J. E. Finnegan, Attorney General; John E. Martin, Asst. Attorney General; Attorneys for Defendants.

[fol. 134] State of Wisconsin,
Milwaukee County, ss:

John H. Schlintz, being first duly sworn on oath deposes and says that he served the annexed objections to the entry

of judgment on one of the attorneys for the defendant, to wit: Jos. P. Brazy, in the city and county of Milwaukee, state of Wisconsin, on the 9th day of March, 1935, by then and there delivering to and leaving with him a true copy of the original hereunto annexed and that he knew the person so served to be one of the attorneys for said defendants, and at the time of said service he endorsed his name and date of service on the copy so served.

John H. Schlintz.

Subscribed and sworn to before me this 11th day of March, 1935. Clarence P. Nett, Notary Public, Milwaukee Co., Wis.

[fol. 135] In Circuit Court of Milwaukee County

Northern Building & Loan Association, a Corporation, Plaintiff,

vs.

Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Defendants

Judgment—Filed March 9, 1935

This cause having been tried before this court Hon. Chas. L. Aarons, Circuit Judge presiding, on August 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counterclaim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin, by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1935; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their

counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given:

On motion of J. E. Finnegan, Attorney General, Benjamin Poss and Joseph P. Brazy, of counsel, attorneys for the defendants,

[fol. 136] It is ordered, adjudged and declared;

(1) That the complaint herein be and the same hereby is dismissed upon its merits.

(2) That the plaintiff association, its officers, directors, stockholders, agents, and employes be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin.

By the Court:

Charles L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin, this 9th day of March, A. D. 1935.

[fol. 137] [File endorsement omitted.]

[fol. 138] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 9, 1935

Please take notice that Northern Building & Loan Association, the plaintiff in this action, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment entered and rendered in this action in the Circuit Court for the County of Milwaukee, on the 9th day of March, 1935, in favor of the defendants and against the

plaintiff and from the whole of said judgment. A copy of said judgment is hereto annexed.

Dated March 9, 1935.

John H. Schlintz, Attorney for Plaintiff.

To J. E. Finnegan, Attorney General; John E. Martin, Asst. Attorney General, Attorneys for Defendants. Benjamin Poss, Joseph P. Brazy, of Counsel. And to the Clerk of the Circuit Court for Milwaukee County.

[fols. 139 & 140] Judgment omitted; printed side page 135, ante.

[fol. 141] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

STIPULATION AND ORDER WAIVING BOND ON APPEAL—Filed March 9, 1935

It is hereby stipulated by and between the parties to this action, through their respective counsel, that the undertaking on appeal to the Supreme Court to pay all costs and damages by virtue of said appeal, is hereby waived.

Dated this 9th day of March, 1935.

John H. Schlintz, Attorney for Plaintiff; James E. Finnegan, Atty. Gen.; Benj. Poss, of Counsel, Attorneys for Defendants, by Joseph P. Brazy.

Upon reading and filing the above stipulation,

It is hereby ordered that the undertaking on appeal to the Supreme Court to pay all costs and damages by virtue of said appeal, be and the same is hereby waived.

Dated this 9th day of March, 1935.

By the Court:

Chas. L. Aarons, Circuit Judge.

[fol. 142] Received copy March 9, 1935.

J. E. Finnegan, Atty. Gen.; Benj. Poss, of Counsel, by Joseph P. Brazy.

[fols. 143 & 144] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 145 & 146] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER SETTING CAUSE—May 1, 1935

And now at this day came the said appellant and moved the Court that this cause be placed on the January 1935 calendar, which motion having been submitted to the Court,

It is now here ordered, that said motion be, and the same is hereby, granted and that the cause be placed on the January 1935 calendar and be considered forthwith upon stipulation of the parties.

[fol. 147] IN SUPREME COURT OF WISCONSIN

NORTHERN BUILDING AND LOAN ASSOCIATION, a Corporation, Respondent,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH as the Banking Commission of the Banking Department of the State of Wisconsin, and Clyde P. Diggles, Supervisor of Building and Loan Associations of the Banking Commission of the State of Wisconsin, Appellants

Appeal from Circuit Court Milwaukee County, State of Wisconsin

JUDGMENT—May 1, 1935

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof; and

It appearing to the satisfaction of the Court that the judgment entered in the Circuit Court of Milwaukee County dated March 9th, 1935, was entered pursuant to and in conformity with the mandate of this Court dated December 11, 1934,

It is now here ordered and adjudged by this Court that said judgment be, and the same is hereby affirmed without costs.

[fol. 148] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 149] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed May 15, 1935

Comes now, Northern Building and Loan Association, a corporation, appellant in the above entitled cause, and adopts its assignments of error as its statement of the points to be relied upon, and states that the whole of the record, as filed, is necessary for the consideration of the case.

Dated May 1st, 1935.

Emery J. Woodall, Attorney for Appellant. John H. Schlintz, Lyman Sherwood, of Counsel.

Service acknowledged this 8th day of May, A. D., 1935.

James E. Finnegan, Atty. Gen., by J. E. Messerschmidt, Asst. Atty. Gen., Attorneys for Appellees.

[fol. 149½] [File endorsement omitted.]

[fol. 150] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 3, 1935

Appeal from the Supreme Court of the State of Wisconsin

Treating the appeal papers herein from the Supreme Court of the State of Wisconsin as an application for a writ of certiorari;

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: File No. 39,600. Wisconsin Supreme Court. Term No. 57. Northern Building and Loan Association, Appellant, vs. Peter A. Cleary, S. N. Schafer and H. F. Ibach, as the Banking Commission of the Banking Department of the State of Wisconsin, et al. Filed May 15, 1935. File No. 57 O. T. 1935.

FILE COPY

FILED
MAY 15 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 553

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET AL.,

Appellants,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

B. F. SALTZSTEIN,
E. J. GROSS,
EMERY J. WOODALL,
LYMAN W. SHERWOOD,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 970

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET AL.,

Appellants,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

Pursuant to Rules 12 and 46 of the Supreme Court of the United States, Hopkins Federal Savings and Loan Association, a corporation organized and existing under and by virtue of the laws of the United States of America, by conversion of Hopkins Street Building and Loan Association, a Wisconsin Corporation; Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow and R. J. Teske, as President, Vice-President, Secretary and Treasurer, respectively, and Edw. F. Maertz, N. F. Remmel, A. J. Kitzerow, R. J. Teske, Ed.

Kieckbusch, Arthur J. Techel, Chas. Hafemann, Jr., and Arthur H. Fluck, as Directors of said Hopkins Federal Savings and Loan Association, and their respective successors in office, appellants in this appeal from a decision of the Supreme Court of the State of Wisconsin, made in the above cause, respectfully show the following in support of the jurisdiction of the Supreme Court of the United States to review the aforesaid cause on appeal:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a, provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b, provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Act of Congress approved February 13, 1925, Chapter 229; 43 Stat. 936; U. S. C. Title 28, Sec. 344(a), amends subsection (a) of Section 237 of the Judicial Code, so that the same provides as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit

could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

Statute of the United States, Section of the Constitution of the State of Wisconsin, and Statutes of the State of Wisconsin, the validity of which is involved.

Section 5 of the Act of Congress approved June 13, 1933; 48 Stat. 128, at page 132, as amended by the Act of Congress approved April 27, 1934; 48 Stat. 643; U. S. C. Supp, Title 12, Sec. 1464, provides:

"Sec. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and *in order to provide for the financing of homes, the* Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as "Federal savings and loan associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

"(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is

therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

"(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office; *Provided,* That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal home-loan bank.

"(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permits its further operation.

"(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

"(f) Each such association, upon its incorporation, shall become automatically a member of the Federal home-loan bank of the district in which it is located,

or if convenience shall require and the Board approve, shall become a member of a Federal home-loan bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

"(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the

amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

"(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local or mutual or co-operative thrift and home financing institutions.

"(i) Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.

"(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is hereby au-

thorized on behalf of the United States to subscribe for any amount of full paid income shares in such association, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds apropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

"(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be

required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States."

Section 1 of Article XI of the Constitution of the State of Wisconsin provides:

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or replaced by the legislature at any time after their passage."

Chapter 215 of the Wisconsin Statutes, 1933, contains the law of the State of Wisconsin relative to the creation, operation, supervision, and termination of Wisconsin Building and Loan Associations.

Section 215.07 of such Chapter, granting powers to such associations, provides as follows:

> "215.07. Powers. Such loan associations shall have power:
>
> "(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; to make loans to members; all upon such terms and conditions as may be provided in the by-laws. • • •
>
> "(5) To exercise all such powers as are necessary and proper to enable them to carry out the purpose of their organization. • • •
>
> "(7) With the advice and approval of the commissioner of banking, to become a member of and/or to

subscribe for and purchase notes and debentures issues by any federal finance or credit corporation which may be organized by act of congress for aiding and assisting building and loan associations to utilize their resources and credit, or to borrow from such finance or credit corporation, in either case in an amount not exceeding that allowed under the provisions of subsection (6) of this section.

"(8) With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provisions in subsection (2) of section 215.07 as to the one-year time limit and as to the amount that may be borrowed, to the contrary notwithstanding."

Section 215.335 gives to state building and loan associations power to consolidate with other associations, located in the same county, with the consent of the commissioner of banking. A majority vote of the board of directors of each association, ratified and confirmed by affirmative vote of the shareholders of each such association owning at least ⅔ of the shares outstanding, at a meeting of such shareholders to be held on call of the directors, after sending notice of the time, place and object of the meeting to each shareholder of record by registered mail at least thirty days prior to said meeting, is required for consolidation.

Section 215.36, dealing with the dissolution of such associations, provides as follows:

"215.36 Dissolution (1) Any association organized or doing business under the provisions of this chapter may go into liquidation or may dissolve such association by a two-thirds vote of all its outstanding authorized capital stock at a stockholders' meeting held especially for that purpose after notice to each stock-

holder of not less than thirty days. Whenever an association has so voted to go into liquidation or to dissolve, it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association by its president and secretary, to the commissioner of banking, and to cause notice thereof to be published once each week for eight successive weeks in a newspaper published in the village, city or county in which the association is located, and if no newspaper is there published then in a newspaper published at the nearest county seat, calling on all persons who may have claims against such association to present their claims to the association and make legal proof thereof at a place and within a time, not earlier than the last date of publication, to be therein specified, and to mail a similar notice to all persons whose names appear as creditors on the books of the association. * * *"

C.

Date of Judgment and of Petition for Appeal.

The decision of the Supreme Court of the State of Wisconsin was announced by written opinion and filed December 11, 1934 (R. 71). The writ of injunction issued, pursuant to said decision, on December 19, 1934 (R. 91). A motion for rehearing was filed in said Court on December 19, 1934, within the time fixed by the rules of said Court (R. 94). Said motion for rehearing was denied by final order of said Court entered on February 5, 1935 (R. 98).

Said decision of the Supreme Court of the State of Wisconsin (R. 71) is reported in the official reports of said Court in — Wisc. —, and in 257 N. W. 684.

The petition for appeal was filed in the office of the Clerk of the Supreme Court of the State of Wisconsin on April 13, 1935 (R. 1), and allowed by the Chief Justice of said Court on April 13, 1935.

D.

Nature of Case and Ruling Below.

The case in the Supreme Court of the State of Wisconsin was brought by appellees herein under section 3 of Article VII of the Constitution of the State of Wisconsin by petition for leave to commence an original action (R. 47).

Leave to commence said original action was granted appellees by said Court on September 14, 1934 (R. 58).

Appellees in said original action prayed said Court for judgment as follows:

> "(1) Declaring said attempted conversion by said Hopkins Street Building and Loan Association to be null, void and of no effect.
>
> "(2) Declaring that said asociation is under the jurisdiction of the Banking Commission of the State of Wisconsin as provided by statute.
>
> "(3) Compelling the officers and directors of said association to operate said association as a Wisconsin building and loan association or to wind up its affairs as such association in the manner provided by the statutes of the State of Wisconsin.
>
> "(4) Restraining and enjoining said association, its officers and directors, from operating as a federal savings and loan association.
>
> "(5) And for such other and further relief as may be just and equitable in the premises."

Said appellees in the said petition for leave to commence an original action (R. 51) prayed for the relief sought on the grounds that:

> (1) As appellees were informed and believed, the United States of America had no right or power to create federal savings and loan associations; that the

provisions of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132) as amended (48 Stat. 643, 645, 646) (U. S. C. Supp., Title 12, Sec. 1464), purporting to authorize the creation of said federal savings and loan associations, were unconstitutional in that Congress had no express or implied power to create such associations; that the creation of said associations was wholly outside the powers vested in Congress by Section 8 of Article I of the Constitution or any other provision of the Constitution of the United States and was in violation of Article X of the Amendments to the Constitution of the United States.

(2) As appellees were informed and believed, the provisions of section 5 (a) of said Home Owners' Loan Act of 1933, as amended, which purported to delegate to the Federal Home Loan Bank Board the power and authority "under such rules and regulations as it may prescribe, to provide for the organizaton, incorporation, examination, operation, and regulation, of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor" was an unconstitutional delegation of the legislative power by the Congress of the United States in violation of Section 1 of Article I of the Constitution of the United States.

(3) As appellees were informed and believed, section 5 (i) of said Home Owners' Loan Act of 1933, as amended, if construed to permit appellant association to convert itself into a federal savings and loan association without State consent, was unconstitutional in that Congress had no express or implied power to authorize such conversion under the provisions of Section 8 of Article I of the Constitution of the United States, or any other provision of the Federal Constitution, and was in violation of Article X of the Amendments to the Constitution of the United States.

(4) As appellees were informed and believed, the provisions of section 5(i) of the said Home Owners'

Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, were void and of no effect and in violation of the Constitution of the United States because Congress had no right or power under the Constitution of the United States to authorize the conversion of a State building and loan association into a Federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion.

(5) As appellees were informed and believed, there were stockholders of the appellant association who did not desire the said association to convert and that the provisions of said section 5(i) denied to all stockholders of the said association who did not desire to convert the equal protection of the laws and deprived them of property without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

(6) As appellees were informed and believed, the appellant association had, and has had, no right or power to convert itself into a Federal savings and loan association.

(7) As appellees were informed and believed, such conversion was in violation of appellant association's charter and the laws of the State of Wisconsin.

Appellants in their answer to said petition (R. 59) denied each and every conclusion of law as set forth therein. No issue of fact was presented to or tried by said Court.

Appellants in their answer prayed for judgment as follows:

"1. Declaring said conversion by said Hopkins Street Building and Loan Association, a Wisconsin corporation, into Hopkins Federal Savings and Loan Association, a national corporation, to be lawful and valid.

"2. Declaring that the Banking Commission of the State of Wisconsin has no jurisdiction over the defendants or of said Hopkins Federal Savings and Loan Association.

"3. For such other and further relief as may be just and equitable in the premises."

The proceedings were docketed in the Supreme Court of the State of Wisconsin in the August Term, 1934, as Cause No. 212.

Appellees obtained a decision declaring that the conversion of Appellant association into Hopkins Federal Savings and Loan Association is null, void and of no effect, and that appellant association is still a Wisconsin association subject to the jurisdiction of the Wisconsin Banking Commission, notwithstanding that a charter as a corporation organized and existing under and by virtue of the laws of the United States had been issued to appellant association by the Federal Home Loan Bank Board pursuant to authority vested in it by Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 646) after appellants had complied with all the rules and regulations of such Board, and with all the provisions and requirements of said Act of Congress, and in particular, with the requirements of paragraph (i) of Section 5 of said Act (48 Stat. 128, 134) as amended, which empowered any member of a federal home loan bank to convert itself into a federal savings and loan association. Such declaration was made also notwithstanding that appellant association was a member of the Federal Home Loan Bank of Chicago. Pursuant to said decision, a writ of injunction issued, December 19, 1934, commanding appellants to operate appellant association as a Wisconsin association under the laws of the State of Wisconsin and under the direction and jurisdiction of the Wiscon-

sin Banking Commission, and enjoining and restraining appellants from operating appellant association as a federal savings and loan association.

There was drawn in question the validity of a statute of the United States, to-wit, Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by the Act of Congress approved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress, as amended, and the decision of the Supreme Court of the State of Wisconsin, was against the validity of such statute of the United States. There was specifically set up and claimed by appellants certain titles, rights, privileges and immunities under said Statute of the United States and said decision denies such titles, rights, privileges and immunities claimed under said Statute of the United States.

Said decision held that appellant association had no power under the Statutes or Constitution of the State of Wisconsin, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government, to-wit, the government of the United States of America, notwithstanding that under Section 2, Article VI of the Constitution of the United States said Act of Congress is the supreme law of the land. Such holding drew in question the validity of said Statute and the Constitution of the State of Wisconsin on the ground of their being repugnant to the Constitution and laws of the United States and was in favor of their validity.

The Supreme Court of the State of Wisconsin, by its decision (R. 71) filed December 11, 1934, determined that the conversion of Hopkins Street Building and Loan Association, a Wisconsin corporation, into the Hopkins Federal Savings and Loan Association, a federal corporation, was null, void and of no effect and that said association was still subject to the jurisdiction of the Banking Commission

of the State of Wisconsin, as provided by the statutes of the State of Wisconsin, and by writ of injunction (R. 91) issued, pursuant to said decision, December 19, 1934, commanded said association, its officers and directors, to operate said association as a Wisconsin building and loan association under the laws of the State of Wisconsin and under the direction and jurisdiction of the Banking Commission of the State of Wisconsin, as provided by the statutes of said State, and enjoined said association, its officers and directors, from operating said association as a federal savings and loan association.

The Supreme Court of the State of Wisconsin is the highest court in Wisconsin in which a decision in the case may be had.

E.

Cases Believed to Sustain Jurisdiction.

Thomas Murdock et al. v. *The Mayor and Aldermen of Memphis et al.*, 87 U. S. (20 Wall.) 590.

Fox River Paper Company v. *Railroad Commission of Wisconsin*, 274 U. S. 651.

Coleman J. Ward et al. v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17.

Missouri, Kansas and Texas Railway Company v. *John S. Elliott*, 184 U. S. 530.

State of California v. *Deseret Water, Oil and Irrigation Company*, 243 U. S. 415.

Mallinckrodt Chemical Works v. *State of Missouri, at the relation of Seebert G. Jones*, 238 U. S. 41.

Hall Neilson v. *Clark B. Lagow et al.*, 53 U. S. (12 How.) 98.

Columbia Water Power Company v. *Columbia Electric Street Railway Light and Power Company*, 172 U. S. 475.

Jacob M. Dickinson v. *George C. Stiles*, 246 U. S. 631.
Dahnke-Walker Milling Company v. *C. T. Bondurant*, 257 U. S. 282.
Samuel H. Leathe v. *Edward L. Thomas*, 207 U. S. 93.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 237 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925 (43 Stat. 936; U. S. C., Title 28, section 344) and as further amended by the Acts of Congress approved January 31, 1928 (45 Stat. 54; U. S. C. Supp., Title 28, section 861-a) and April 26, 1928 (45 Stat. 466; U. S. C. Supp., Title 28, section 861-b).

Respectfully submitted,

B. F. Saltzstein,
E. J. Gross,
Attorneys for Defendants and Appellants.

Emery J. Woodall,
Lyman W. Sherwood,
Of Counsel.

(6361-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 71 56

RELIANCE BUILDING AND LOAN ASSOCIATION,
A CORPORATION,

Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH,
AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

WALLACE REISS,
EMERY J. WOODALL,
LYMAN W. SHERWOOD,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 971

RELIANCE BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Plaintiff and Appellant

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Defendants and Appellees.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

Pursuant to Rules 12 and 46 of the Supreme Court of the United States, Reliance Building and Loan Association, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, appellant in this appeal from a decision of the Supreme Court of the State of Wisconsin, made in the above-entitled cause, respectfully shows the following in support of the jurisdiction of the Supreme

Court of the United States to review the aforesaid cause on appeal:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a, provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b, provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Act of Congress approved February 13, 1925, Chapter 229; 43 Stat. 936; U. S. C. Title 28, Sec. 344 (a), amends subsection (a) of Section 237 of the Judicial Code, so that the same provides as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been

rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

Statute of the United States, Section of the Constitution of the State of Wisconsin, and Statutes of the State of Wisconsin, the Validity of Which is Involved.

Section 5 of the Act of Congress approved June 13, 1933; 48 Stat. 128, at page 132, as amended by the Act of Congress approved April 27, 1934; 48 Stat. 643; U. S. C. Supp., Title 12, Sec. 1464, provides:

"Sec. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescibe, to provide for the oganization, incorporation, examination, operation, and regulation, of associations to be known as "Federal savings and loan associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

"(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

"(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home

office; *Provided*, That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further*, That any portion of the assets of any such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank.

"(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

"(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

"(f) Each such association, upon its incorporation, shall become automatically a member of the Federal ~~Home Loan~~ Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

"(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for pre-

ferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares

held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

"(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local or mutual or cooperative thrift and home financing institutions.

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.

"(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is hereby authorized on behalf of the United States to subscribe for any amount of full paid income shares in such association, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to

time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

"(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States."

Section 1 of Article XI of the Constitution of the State of Wisconsin provides:

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Chapter 215 of the Wisconsin Statutes, 1933, contains the law of the State of Wisconsin relative to the creation, operation, supervision, and termination of Wisconsin Building and Loan Associations.

Section 215.07 of such Chapter, granting powers to such association, provides as follows:

> "215.07 Powers.—Such local association shall have power:
>
> "(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; to make loans to members; all upon such terms and conditions as may be provided in the by-laws. * * *
>
> "(5) To exercise all such powers as are necessary and proper to enable them to carry out the purposes of their organization. * * *
>
> "(7) With the advice and approval of the Commissioner of banking, to become a member of and/or to subscribe for and purchase notes and debentures issued by any federal finance or credit corporation which may be organized by act of Congress for aiding and assisting building and loan associations to utilize their resources and credit, or to borrow from such finance or

credit corporation, in either case in an amount not exceeding that allowed under the provisions of subsection (6) of this section.

"(8) With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provisions in subsection (2) of section 215.07 as to the one-year time limit and as to the amount that may be borrowed, to the contrary notwithstanding."

Section 215.335 gives to state building and loan associations power to consolidate with other associations, located in the same county, with the consent of the commissioner of banking. A majority vote of the board of directors of each association, ratified and confirmed by affirmative vote of the shareholders of each such association owning at least 2/3 of the shares outstanding, at a meeting of such shareholders to be held on call of the directors, after sending notice of the time, place and object of the meeting to each shareholder of record by registered mail at least thirty days prior to said meeting, is required for consolidation.

Section 215.36, dealing with the dissolution of such associations, provides as follows:

"215.36. Dissolution.—(1) Any association organized or doing business under the provisions of this chapter may go into liquidation or may dissolve such association by a two-thirds vote of all its outstanding authorized capital stock at a stockholders' meeting held especially for that purpose after notice to each stockholder of not less than thirty days. Whenever as association has so voted to go into liquidation or to dissolve, it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association by its president and secretary, to the commissioner of banking, and to cause notice thereof

to be published once each week for eight successive weeks in a newspaper published in the village, city or county in which the association is located, and if no newspaper is there published, then in a newspaper published at the nearest county seat, calling on all persons who may have claims against such association to present their claims to the association and make legal proof thereof at a place and within a time, not earlier than the last date of publication, to be therein specified, and to mail a similar notice to all persons whose names appear as creditors on the books of the association. * * *"

C.

Date of Judgment and of Petition for Appeal.

The Supreme Court of the State of Wisconsin affirmed, by judgment entered May 1st, 1935 (R. 147), the judgment of the Circuit Court of Milwaukee County of the State of Wisconsin entered March 9, 1935 (R. 136-137). Over objection of appellant, said Circuit Court had entered such judgment pursuant to remittitur of said Supreme Court in accordance with the decision of said Supreme Court, filed December 11, 1934 (R. 104-121), which had reversed, upon an appeal by appellees herein, the earlier judgment, entered September 12, 1934 (R. 94-95), of said Circuit Court in favor of appellant herein. A motion for rehearing was filed in said Supreme Court December 31, 1934 (R. 124) within the time fixed by the rules of said Supreme Court (R. 34). Such motion for rehearing was denied by order of said Supreme Court entered on February 5th, 1935 (R. 127).

The original judgment of said Circuit Court was entered on September 12, 1934, pursuant to the decision of said Circuit Court (R. 94-95) filed on the same day.

The decision of the Supreme Court of the State of Wisconsin (R. 81-92), filed December 11, 1934, upon the first appeal from said Circuit Court, is reported in the official

reports of said Supreme Court in — Wisc. — and in 257 N. W. 684.

The Petition for Appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin on May 1st, 1935 (R. 6-7) and filed in the office of said Supreme Court on the same day.

D.

Nature of Case and Ruling Below.

Appellant (Plaintiff below) by its original bill (R. 5-16) in the Circuit Court of Milwaukee County, State of Wisconsin, prayed as follows:

> "1. That an order be issued temporarily restraining and enjoining said defendants, and each of them, their employees, agents and representatives, from seizing, taking possession of, carrying away, keeping or retaining any of the property, books of accounts, records, or assets of said plaintiff, and from interfering with the conduct and management of the business of said plaintiff Association.
>
> "2. That said defendants, and each of them, their employees, agents and officers, be restrained and enjoined from interfering with the officers, directors or stockholders of said plaintiff Association, and with any meeting or meetings of said officers, directors or stockholders called for the purpose of considering, determining and voting upon the lawful business and affairs of said plaintiff Association, and more particularly aforementioned proposed conversion.
>
> "3. That said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations of Wisconsin, their employees, agents and representatives be permanently restrained and enjoined from interfering with the property and lawful conduct and business of said plaintiff.

"4. That plaintiff have such other and further relief as may appear just and equitable in the premises."

Appellant prayed for said relief on the following grounds:

1. That, as appellant was informed and verily believed, during the process of a conversion, similar to appellant's proposed conversion, from a state corporation to a federal savings and loan association on part of the West Lawn Building and Loan Association, located at Racine, Wisconsin, appellees (defendants below) threatened to seize and take over the business of said association by taking possession of its office, books and records, by threatening to oust the Board of Directors, by interfering with stockholders' meetings and attempting to influence stockholders' meetings, and by threatening that if its proposed special stockholders' meeting were not adjourned or dismissed, appellees would take over all of the property of said association; however, appellees, and each of them, were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with said association and its proposed meeting and conversion.

2. That, as appellant was informed and verily believed, immediately upon receipt of information of the proposed conversion by appellant and of the proposed meeting of its stockholders, appellees intended to seize and take over the affairs, business, property and assets of appellant and to interfere with and prevent the proposed meeting of its stockholders, contrary to law and the statutes; and without cause, excuse or justification that appellees had threatened and would proceed to oust the officers and directors and to take possession of the business, assets and operation of each building and loan association of the State of Wisconsin which might attempt or take any steps toward converting into a federal savings and loan association, and more particularly, the appellant, for no other cause, purpose, reason or excuse than merely the fact of such proposed conversion.

3. That appellant was not violating and never had violated its charter, by-laws, or any law under which it operated or the direction or orders of the Banking Department or the Banking Commission or the Supervisor of Building and Loan Associations of the State of Wisconsin; that the affairs of appellant were in sound condition, its business conducted in a safe and authorized manner, its capital wholly unimpaired, and appellant was and had been at all times a solvent and going concern, and that there was no valid reason, cause or excuse, and no legal or equitable grounds for appellees to take possession of appellant; that all the assets, books of account, records and proceedings of appellant, including both real and personal property, were located within the County of Milwaukee, State of Wisconsin; and that such proposed and threatened seizure and control by appellees was contrary to the judgment and will of the officers, directors and stockholders of appellant and would result in serious and irreparable damage to appellant.

Appellees by their amended answer (R. 62-65) admitted that they were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with West Lawn Building and Loan Association, Racine, Wisconsin, and its proposed meeting and conversion; denied notice of the proposed conversion by appellant prior to service of summons and complaint in this cause; denied that appellees had made any attempt to seize and take over the affairs, business, property and assets of appellant or to interfere with or prevent the proposed meeting of appellant's stockholders or had threatened to oust the officers and directors or take possession of the business, assets and operation of building and loan associations of the State of Wisconsin which might attempt conversion into a federal savings and loan association. However, appellees, by their amended answer (R. 62-65) alleged:

1. That the proposed conversion by appellant as set forth in the complaint was a violation of its charter, by-laws, and the laws of the State of Wisconsin;

2. That under the laws of the State of Wisconsin, the Banking Commission is authorized to take possession of the property and business of any building and loan association organized under the laws of the State of Wisconsin which violated its charter, by-laws or the laws of the State of Wisconsin; and

3. That the taking over of possession of appellant by appellees would not result in any damage to appellant.

Appellees by way of counterclaim (R. 58-60) alleged:

1. That on or about March 31, 1934, appellant through its officers and directors made application, without the consent or authority of the Banking Commission of the State of Wisconsin, to the Federal Home Loan Bank Board for permission to convert itself into a federal savings and loan association under the provisions of Sec. 5 (i) of Home Owners' Loan Act of 1933, as amended by Act of Congress, approved April 27, 1934. Thereafter, as appellees were informed and believe, the said Federal Home Loan Bank Board granted said permission to appellant.

2. That on or about July 30, 1934, appellant mailed to each of its stockholders a notice of a special meeting of stockholders to be held August 20, 1934, for the purpose of voting upon a recommendation and resolution of its Board of Directors that it convert itself into a federal savings and loan association.

3. That the United States of America has no right or power to create federal savings and loan associations; that the provision of Sec. 5 of Home Owners' Loan Act of 1933, as amended, purporting to authorize the creation of federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such federal associations;

that the creation of such federal associations is wholly outside the powers vested in Congress by Sec. 8 of Article I of the Constitution, or any other provision of the Constitution of the United States, and is in direct violation of Article X of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board any power and authority, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor" is an unconstitutional delegation of legislative power by the Congress of the United States in violation of Sec. 1 of Article I of the Constitution of the United States; that appellant had no right or power to convert itself into a federal savings and loan association; that such conversion would be in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without state consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the United States, or any other provision of the Constitution of the United States, and is in violation of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) would deny to all stockholders of appellant

who do not desire the association to convert, the equal protection of the laws and would deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States.

4. That appellant would unlawfully convert itself into a federal savings and loan association unless restrained by the Court from taking any further steps in said conversion; that appellant proposed and intended to accept a charter from the Federal Home Loan Bank Board and to discontinue doing business as a Wisconsin building and loan association under the jurisdiction of the Banking Commission; that appellant intended to transfer all of its assets to said proposed federal association and to issue to its members stock certificates in said federal association in lieu of stock certificates issued by the appellant, all in violation of the laws of the State of Wisconsin and the orders of the Banking Commission of the State of Wisconsin.

Appellees prayed said Circuit Court (R. 591-60) as follows:

"(1) Dismissing the complaint of the plaintiff (appellant) herein upon its merits.

"(2) Declaring that the defendants (appellees) have full power and authority to take possession of the plaintiff (appellant) association under the laws of the State of Wisconsin.

"(3) Restraining and enjoining the plaintiff (appellant) association, its officers, directors, stockholders, agents and employees, from taking any other or further steps in said attempted conversion by said plaintiff (appellant) into a federal savings and loan association.

"(4) And for such other and further relief as may be just and equitable and for the defendants' (appellees') costs and disbursements in this action."

Appellant in its reply (R. 67-69):

1. Admitted that under the laws of the State of Wisconsin, the Banking Commission is authorized to take possession of the property and business of any building and loan association organized under the laws of the State of Wisconsin which violates its charter, by-laws, or the laws of the State of Wisconsin;

2. Denied each and every other conclusion of law set forth by appellees;

3. And further denied that the consent of the Banking Commission of the State of Wisconsin to the conversion of itself into a federal savings and loan association was required or necessary under the provisions of Section 5 (i) of Home Owners' Loan Act of 1933, as amended by Act of Congress approved April 27, 1934.

The case was heard by said Circuit Court upon stipulation by respective counsel (R. 73) that no issue of fact was presented by the pleadings and that the Court might render judgment upon the merits without taking testimony. Said Circuit Court entered judgment on September 12, 1934 in favor of appellant as follows:

"This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, circuit judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein, and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association (appellant) has the right and power to convert into a federal savings and loan association, and that the Acts of Congress so providing, are valid and constitutional.

(2) That the defendants (appellees) have no right or authority to take possession of the plaintiff associa-

tion (appellant) to prevent its conversion into a federal savings and loan association.

(3) That the defendants (appellees), their agents, servants and employees be and they hereby are restrained and enjoined from taking possession of the plaintiff association (appellant) or interfering in any way with the proposed conversion of the plaintiff (appellant) into a federal savings and loan association.

(4) That the defendants' (appellees') counterclaim be and the same hereby is dismissed on the merits."

Appellees in the first appeal to the Supreme Court of the State of Wisconsin in this cause assigned as error (R. 99) the failure of said Circuit Court to find:

"1. That Congress has no power to incorporate federal savings and loan associations;

"2. Assuming that it has such power, that Congress improperly delegated this power to the Federal Home Loan Bank Board;

"3. That the language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, implies necessity of State consent to the proposed conversion of a state building and loan association into a federal savings and loan association; and

"4. That Congress has no power to authorize the conversion of state building and loan associations into federal savings and loan associations without the consent of the State."

Said Supreme Court reversed the judgment (R. 123) and remitted the cause (R. 123) to said Circuit Court with instructions to enter judgment for appellees. Said Circuit Court, over objections by appellant, duly filed, and pursuant to said remittitur, entered judgment (R. 136-137) as follows:

"This cause having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge presiding on Au-

gust 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counterclaim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin, by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1935; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given;

"On motion of J. E. Finnegan, Attorney General, Benjamin Poss and Joseph P. Brazy, of counsel, attorneys for the defendants,

"It is ordered, adjudged and declared:

"(1) That the complaint herein be and the same hereby is dismissed upon its merits.

"(2) That the plaintiff association, its officers, directors, stockholders, agents and employees be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

"(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin."

Appellant thereupon appealed (R. 139) from said judgment to the Supreme Court of the State of Wisconsin on grounds similar to those stated in its pleadings in the original cause. The Supreme Court of the State of Wisconsin affirmed (R. 147) said judgment of said Circuit Court and

by its final order (R. 147) entered on May 1st, 1935, denied motion for re-hearing made by appellant.

The proceedings were docketed in the Supreme Court of the State of Wisconsin in the August Term, 1934, as Cause No. 214.

Said judgment, which enjoined appellant from converting, was rendered notwithstanding that appellant had except as prevented by injunction complied with all the rules and regulations of the Federal Home Loan Bank Board promulgated pursuant to the authority vested in said Board by Section 5 of Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended by Act of Congress, approved April 27, 1934 (48 Stat. 643, 645), and had complied with all the provisions and requirements of Section 5 of said Act, as amended, and in particular, with the requirements of paragraph (i) of Section 5 of said Act of Congress, as amended, which empowered any member of a Federal Home Loan Bank to convert itself into a federal savings and loan association, upon a vote of 51 percentum or more of the votes cast at a legal meeting called to consider such action and notwithstanding that appellant was a member of the Federal Home Loan Bank of Chicago, and had been granted permission to so convert, and its stockholders, at a legal meeting called for such purpose, had by a vote of more than 51 percentum of the votes cast, voted to so convert.

By such decision there was drawn in question the validity of a statute of the United States, to-wit, Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by Act of Congress, approved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress, as amended, and the decision of the Supreme Court of the State of Wisconsin, was against the validity of such statute of the United States. There was specifically set up and claimed by ap-

pellant certain titles, rights, privileges and immunities under said statute of the United States and said decision denies such titles, rights, privileges and immunities claimed under said statute of the United States.

Said decision held that appellant had no power under the statutes or Constitution of the State of Wisconsin, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government, to-wit, the government of the United States of America, notwithstanding the fact that, under Section 2 of Article VI of the Constitution of the United States, Section 5 of Home Owners' Loan Act of 1933, as amended, is the supreme law of the land. Such holding drew in question the validity of the statutes and the Constitution of the State of Wisconsin on the ground that they were repugnant to the Constitution and laws of the United States and such holding was in favor of their validity.

The Supreme Court of the State of Wisconsin is the highest court in Wisconsin in which a decision in the case may be had.

E.

Thomas Murdock et al. v. *The Mayor and Aldermen of Memphis et al.*, 87 U. S. (20 Wall.) 590.

Fox River Paper Company v. *Railroad Commission of Wisconsin*, 274 U. S. 651.

Coleman J. Ward et al. v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17.

Missouri, Kansas and Texas Railway Company v. *John S. Elliott*, 184 U. S. 530.

State of California v. *Deseret Water, Oil and Irrigation Company*, 243 U. S. 415.

Mallinckrodt Chemical Works v. *State of Missouri, at the relation of Seebert G. Jones*, 238 U. S. 41.

Hall Neilson v. *Clark B. Lagow et al.*, 53 U. S. (12 How.) 98.

Columbia Water Power Company v. *Columbia Electric Street Railway Light and Power Company*, 172 U. S. 475.

Jacob M. Dickinson v. *George C. Stiles*, 246 U. S. 631.

Dahnke-Walker Milling Company v. *C. T. Bondurant*, 257 U. S. 282.

Samuel H. Leathe v. *Edward L. Thomas*, 207 U. S. 93.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 237 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925 (43 Stat. 936; U. S. C., Title 28, section 344) and as further amended by the Acts of Congress approved January 31, 1928 (45 Stat. 54; U. S. C. Supp., Title 28, section 861-a) and April 26, 1928 (45 Stat. 466; U. S. C. Supp., Title 28, section 861-b).

Respectfully submitted,

WALLACE REISS,
Attorney for Plaintiff and Appellant.

EMERY J. WOODALL,
LYMAN W. SHERWOOD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 724 57

NORTHERN BUILDING AND LOAN ASSOCIATION,
Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH,
AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT
OF THE STATE OF WISCONSIN ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

JOHN H. SCHLINTZ,
EMERY J. WOODALL,
LYMAN W. SHERWOOD,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972

NORTHERN BUILDING AND LOAN ASSOCIATION,
A CORPORATION,
Plaintiff and Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,
Defendants and Appellees.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

Pursuant to Rules 12 and 46 of the Supreme Court of the United States, Northern Building and Loan Association, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, appellant in this appeal from a decision of the Supreme Court of the State of Wisconsin, made in the above cause, respectfully shows the following in support of the jurisdiction of the Supreme Court

of the United States to review the aforesaid cause on appeal:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a, provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b, provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Act of Congress approved February 13, 1925, Chapter 229; 43 Stat. 936; U. S. C. Title 28, Sec. 344(a), amends subsection (a) of Section 237 of the Judicial Code, so that the same provides as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court

upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

Statute of the United States, Section of the Constitution of the State of Wisconsin, and Statutes of the State of Wisconsin, the Validity of Which are Involved.

Section 5 of the Act of Congress approved June 13, 1933; 48 Stat. 128, at page 132, as amended by the Act of Congress approved April 27, 1934; 48 Stat. 643; U. S. C. Supp., Title 12, Sec. 1464, provides:

"Sec. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation, of associations to be known as "Federal savings and loan associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

"(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

"(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and

business property within fifty miles of their home office; *Provided*, That not more than $20,000 shall be loaned on the security of a first lien upon anw one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further*, That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal home-loan bank.

"(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

"(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

"(f) Each such association, upon its incorporation, shall become automatically a member of the Federal home-loan bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal home-loan bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

"(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for pre-

ferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the

shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

"(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local or mutual or cooperative thrift and home financing institutions.

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.

"(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is hereby authorized on behalf of the United States to subscribe for any amount of full paid income shares in such association, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the

approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

"(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

Section 1 of Article XI of the Constitution of the State of Wisconsin provides:

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Chapter 215 of the Wisconsin Statutes, 1933, contains the law of the State of Wisconsin relative to the creation, operation, supervision, and termination of Wisconsin Building and Loan Associations.

Section 215.07 of such Chapter, granting powers to such associations, provides as follows:

> "215.07 Powers. Such local associations shall have power
>
> "(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; to make loans to members; all upon such terms and conditions as may be provided in the by-laws. • • •
>
> "(5) To exercise all such powers as are necessary and proper to enable them to carry out the purpose of their organization. • • •
>
> "(7) With the advice and approval of the commissioner of banking, to become a member of and/or to subscribe for and purchase notes and debentures issued by any federal finance or credit corporation which may be organized by act of Congress for aiding and assisting building and loan associations to utilize their resources and credit, or to borrow from such

finance or credit corporation, in either case in an amount not exceeding that allowed under the provisions of subsection (6) of this section.

"(8) With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provisions in subsection (2) of section 215.07 as to the one-year time limit and as to the amount that my be borrowed, to the contrary notwithstanding."

Section 215.335 gives to state building and loan associations power to consolidate with other associations, located in the same county, with the consent of the commissioner of banking. A majority vote of the board of directors of each association, ratified and confirmed by affirmative vote of the shareholders of each such association owning at least ⅔ of the shares outstanding, at a meeting of such shareholders to be held on call of the directors, after sending notice of the time, place and object of the meeting to each shareholder of record by registered mail at least thirty days prior to said meeting, is required for consolidation.

Section 215.36, dealing with the dissolution of such associations, provides as follows:

"215.36. Dissolution (1) Any association organized or doing business under the provisions of this chapter may go into liquidation or may dissolve such association by a two-thirds vote of all its outstanding authorized capital stock at a stockholders' meeting held especially for that purpose after notice to each stockholder of not less than thirty days. Whenever an association has so voted to go into liquidation or to dissolve, it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association by its president and secretary,

to the commissioner of banking, and to cause notice thereof to be published once each week for eight successive weeks in a newspaper published in the village, city or county in which the association is located, and if no newspaper is there published, then in a newspaper published at the nearest county seat, calling on all persons who may have claims against such association to present their claims to the association and make legal proof thereof at a place and within a time, not earlier than the last date of publication, to be therein specified, and to mail a similar notice to all persons whose names appear as creditors on the books of the association * * *."

C.

Date of Judgment and of the Petition for Appeal.

The Supreme Court of the State of Wisconsin affirmed, by judgment entered May 1st, 1935 (R. 147), the judgment of the Circuit Court of Milwaukee County of the State of Wisconsin entered March 9, 1935 (R. 130-133). Over objection of appellant, said Circuit Court had entered such judgment pursuant to remittitur of said Supreme Court in accordance with the decision of said Supreme Court, filed December 11, 1934 (R. 104-121), which had reversed, upon an appeal by appellees herein, the earlier judgment, entered September 12, 1934 (R. 98), of said Circuit Court in favor of appellant herein. A motion for rehearing was filed in said Supreme Court December 20th, 1934 (R. 124), within the time fixed by the rules of said Supreme Court (R. 34). Such motion for rehearing was denied by order of said Supreme Court entered on February 5th, 1935 (R. 125a).

The original judgment of said Circuit Court was entered on September 12, 1934, pursuant to the decision of said Circuit Court (R. 84-96) filed on the same day.

The decision of the Supreme Court of the State of Wisconsin (R. 104-121), filed December 11, 1934, upon the first

appeal from said Circuit Court, is reported in the official reports of said Supreme Court in —— Wisc. —— and in 257 N. W. 684.

The Petition for Appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin on May 1st, 1935 (R. 6-7) and filed in the office of said Supreme Court on the same day.

D.

Nature of Case and Ruling Below.

Appellant (Plaintiff below) by its original bill (R. 45-52) in the Circuit Court of Milwaukee County, State of Wisconsin, prayed as follows:

> "1. That an order be issued temporarily restraining and enjoining said defendants, and each of them, their employees, agents and representatives, from seizing, taking possession of, carrying away, keeping or retaining any of the property, books of accounts, records, or assets of said plaintiff, and from interfering with the conduct and management of the business of said plaintiff Association.
>
> "2. That said defendants, and each of them, their employees, agents and officers, be restrained and enjoined from interfering with the officers, directors or stockholders of said plaintiff Association, and with any meeting or meetings of said officers, directors or stockholders called for the purpose of considering, determining and voting upon the lawful business and affairs of said plaintiff Association, and more particularly aforementioned proposed conversion.
>
> "3. That said defendants, and each of them, as such Banking Commission and Supervisor of Building and Loan Associations of Wisconsin, their employees, agents and representatives be permanently restrained

and enjoined from interfering with the property and lawful conduct and business of said plaintiff.

"4. That plaintiff have such other and further relief as may appear just and equitable in the premises."

Appellant prayed for said relief on the following grounds:

1. That, as appellant was informed and verily believed, during the process of a conversion, similar to appellant's proposed conversion, from a state corporation to a federal savings and loan association on part of the West Lawn Building and Loan Association, located at Racine, Wisconsin, appellees (defendants below) threatened to seize and take over the business of said association by taking possession of its office, books and records, by threatening to oust the Board of Directors, by interfering with stockholders' meetings and attempting to influence stockholders' meetings, and by threatening that if its proposed special stockholders' meeting were not adjourned or dismissed, appellees would take over all of the property of said association; however, appellees, and each of them, were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with said association and its proposed meeting and conversion.

2. That, as appellant was informed and verily believed, immediately upon receipt of information of the proposed conversion by appellant and of the proposed meeting of its stockholders, appellees intended to seize and take over the affairs, business, property and assets of appellant and to interfere with and prevent the proposed meeting of its stockholders, contrary to law and the statutes; and without cause, excuse or justification that appellees had threatened and would proceed to oust the officers and directors and to take possession of the business, assets and operation of each building and loan association of the State of Wisconsin which might attempt or take any steps toward converting into a federal savings and loan association,

and more particularly, the appellant, for no other cause, purpose, reason or excuse than merely the fact of such attempted and proposed conversion.

3. That appellant was not violating and never had violated its charter, by-laws, or any law under which it operated or the direction or orders of the Banking Department or the Banking Commission or the Supervisor of Building and Loan Associations of the State of Wisconsin; that the affairs of appellant were in sound condition, its business conducted in a safe and authorized manner, its capital wholly unimpaired, and appellant was and had been at all times a solvent and going concern, and that there was no valid reason, cause or excuse, and no legal or equitable grounds for appellees to take possession of appellant; that all the assets, books of account, records and proceedings of appellant, including both real and personal property, were located within the County of Milwaukee, State of Wisconsin; and that such proposed and threatened seizure and control by appellees was contrary to the judgment and will of the officers, directors and stockholders of appellant and would result in serious and irreparable damage to appellant.

Appellees by their amended answer (R. 62-66) admitted that they were enjoined by order of the Circuit Court of Racine County, Wisconsin, from interfering with West Lawn Building and Loan Association, Racine, Wisconsin, and its proposed meeting and conversion; denied notice of the proposed conversion by appellant prior to service of summons and complaint in this cause; denied that appellees had made any attempt to seize and take over the affairs, business, property and assets of appellant or to interfere with or prevent the proposed meeting of appellant's stockholders or had threatened to oust the officers and directors or take possession of the business, assets and operation of building and loan associations of the State of Wisconsin which might attempt conversion into a federal

savings and loan association. However, appellees, by their amended answer (R. 62-66) alleged:

1. That the proposed conversion by appellant as set forth in the complaint was a violation of its charter, by-laws, and the laws of the State of Wisconsin;

2. That under the laws of the State of Wisconsin the Banking Commission was authorized to take possession of the property and business of any building and loan association organized under the laws of the State of Wisconsin which had violated its charter, by-laws or the laws of the State of Wisconsin; and

3. That the taking over of possession of appellant by appellees would not result in any damage to appellant.

Appellees by way of counterclaim (R. 54-60) alleged:

1. That on or about March 31, 1934, appellant through its officers and directors made application, without the consent or authority of the Banking Commission of the State of Wisconsin, to the Federal Home Loan Bank Board for permission to convert itself into a federal savings and loan association under the provisions of Sec. 5 (i) of Home Owners' Loan Act of 1933, as amended by Act of Congress, approved April 27, 1934. Thereafter, as appellees were informed and believe, the said Federal Home Loan Bank Board granted said permission to appellant.

2. That on or about July 20, 1934, appellant mailed to each of its stockholders a notice of a special meeting of stockholders to be held August 20, 1934 for the purpose of voting upon a recommendation and resolution of its Board of Directors that it convert itself into a federal savings and loan association.

3. That the United States of America has no right or power to create federal savings and loan associations; that the provision of Sec. 5 of Home Owners' Loan Act of 1933, as amended, purporting to authorize

the creation of federal savings and loan associations, are unconstitutional in that Congress has no express or implied power to create such federal associations; that the creation of such federal associations is wholly outside the powers vested in Congress by Sec. 8 of Article I of the Constitution, or any other provision of the Constitution of the United States, and is in direct violation of Article X of the Amendments to the Constitution of the United States; that the provisions of Sec. 5 (a) of Home Owners' Loan Act of 1933, as amended, which purport to delegate to the Federal Home Loan Bank Board any power and authority, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor" is an unconstitutional delegation of legislative power by the Congress of the United States in violation of Sec. 1 of Article I of the Constitution of the United States; that appellant had no right or power to convert itself into a federal savings and loan association; that such conversion would be in violation of its charter and the laws of the State of Wisconsin; that the provisions of Sec. 5 (i) of Home Owners' Loan Act of 1933, as amended, if construed to authorize said conversion without the consent of or in violation of the laws of the State of Wisconsin, are void and of no effect and in violation of the Constitution of the United States because Congress has no right or power under the Constitution of the United States to authorize the conversion of a state building and loan association into a federal savings and loan association contrary to the laws of the State of Wisconsin or without legislation of the State of Wisconsin consenting to such conversion; that said Sec. 5 (i), if construed to permit said conversion without state consent, is unconstitutional in that Congress has no express or implied power to authorize such conversion under the provisions of Sec. 8 of Article I of the Constitution of the United States, or any other pro-

vision of the Constitution of the United States, and is in violation of Article X of the Amendments to the Constitution of the United States; that the provisions of said Sec. 5 (i) would deny to all stockholders of appellant who do not desire the association to convert, the equal protection of the laws and would deprive them of property without due process of law, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States.

4. That appellant would unlawfully convert itself into a federal savings and loan association unless restrained by the Court from taking any further steps in said conversion; that appellant proposed and intended to accept a charter from the Federal Home Loan Bank Board and to discontinue doing business as a Wisconsin building and loan association under the jurisdiction of the Banking Commission; that appellant intended to transfer all of its assets to said proposed federal association and to issue to its members stock certificates in said federal association in lieu of stock certificates issued by the appellant, all in violation of the laws of the State of Wisconsin and the orders of the Banking Commission of the State of Wisconsin.

Appellees prayed said Circuit Court (R. 54-60) as follows:

"(1) Dismissing the complaint of the plaintiff (appellant) herein upon its merits.

"(2) Declaring that the defendants (appellees) have full power and authority to take possession of the plaintiff (appellant) association under the laws of the State of Wisconsin.

"(3) Restraining and enjoining the plaintiff (appellant) association, its officers, directors, stockholders, agents and employes, from taking any other or further steps in said attempted conversion by said plaintiff (appellant) into a federal savings and loan association.

"(4) And for such other and further relief as may be just and equitable and for the defendants' (appellees') costs and disbursements in this action.

Appellant in its reply (R. 68-72) denied each and every conclusion of law set forth by appellees and further denied that the consent of the Banking Commission of the State of Wisconsin to the conversion of itself into a federal savings and loan association was required or necessary under the provisions of Section 5 (i) of Home Owners' Loan Act of 1933, as amended by Act of Congress approved April 27, 1934.

The case was heard by said Circuit Court upon stipulation by respective counsel (R. 82) that no issue of fact was presented by the pleadings and that the Court might render judgment upon the merits without taking testimony. Said Circuit Court entered judgment on September 12, 1934 in favor of appellant as follows:

"This cause being at issue and coming on for trial before the court, and having been tried before this court, Hon. Chas. L. Aarons, circuit judge presiding, on August 7, 1934, upon the issues of law raised in the pleadings on file herein, and the Court having ordered the entry of judgment as follows:

It is ordered, adjudged and declared:

(1) That the plaintiff association (appellant) has the right and power to convert into a federal savings and loan association, and that the Acts of Congress so providing, are valid and constitutional.

(2) That the defendants (appellees) have no right or authority to take possession of the plaintiff association (appellant) to prevent its conversion into a federal savings and loan association.

(3) That the defendants (appellees), their agents, servants and employees be and they hereby are re-

strained and enjoined from taking possession of the plaintiff association (appellant) or interfering in any way with the proposed conversion of the plaintiff (appellant) into a federal savings and loan association.

(4) That the defendants' (appellees') counterclaim be and the same hereby is dismissed on the merits."

Appellees in the first appeal to the Supreme Court of the State of Wisconsin in this cause assigned as error (R. 100-101) the failure of said Circuit Court to find:

"1. That Congress has no power to incorporate federal savings and loan associations;

"2. Assuming that it has such power, that Congress improperly delegated this power to the Federal Home Loan Bank Board;

"3. That the language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, implies necessity of State consent to the proposed conversion of a state building and loan association into a federal savings and loan association; and

"4. That Congress has no power to authorize the conversion of state building and loan associations into federal savings and loan associations without the consent of the State.

"If the Banking Commission is correct in any one of its foregoing contentions, it follows that Wisconsin building and loan associations cannot lawfully convert into federal savings and loan associations and that the Banking Commission is entitled to the relief which it seeks in these actions."

Said Supreme Court reversed the judgment (R. 104-121) and remitted the cause (R. 122) to said Circuit Court with instructions to enter judgment for appellees. Said Circuit Court over objection of appellant, duly filed and pursuant to said remittitur, entered judgment (R. 135-136) as follows:

"This cause having been tried before this court, Hon. Chas. L. Aarons, Circuit Judge presiding on August 7, 1934, and judgment having been rendered for the plaintiff on the 12th day of September, 1934, granting the said plaintiff the relief which it sought in its complaint and dismissing the defendants' counterclaim on its merits; and the defendants having duly appealed from the judgment, and the whole thereof, to the Supreme Court of the State of Wisconsin, by which the said judgment was on the 11th day of December, 1934, wholly reversed and a motion for rehearing denied February 5th, 1935; and the record in this cause having been duly remitted from the Supreme Court to the Circuit Court upon such reversal with directions by said appellate court that judgment be entered in favor of the defendants on their counterclaim; and due notice thereof having been given to the plaintiff as appears by the proofs on file; and due notice for the application of this judgment having been given;

"On motion of J. B. Finnegan, Attorney General, Benjamin Poss and Joseph P. Brazy, of counsel, attorneys for the defendants,

"It is ordered, adjudged and declared:

"(1) That the complaint herein be and the same hereby is dismissed upon its merits.

"(2) That the plaintiff association, its officers, directors, stockholders, agents and employees be and they are hereby restrained and enjoined from taking any other or further steps in the matter of the attempted conversion by said plaintiff association into a federal savings and loan association.

"(3) That the defendants have full power and authority to take possession of the plaintiff association under the laws of the State of Wisconsin."

Appellant thereupon appealed (R. 138) from said judgment to the Supreme Court of the State of Wisconsin on grounds similar to those stated in its pleadings in the

original cause. The Supreme Court of the State of Wisconsin affirmed (R. 147) said judgment of said Circuit Court and by its final order (R. 147) entered on May 1st, 1935, denied motion for re-hearing made by appellant.

The proceedings were docketed in the Supreme Court of the State of Wisconsin in the August Term, 1934, as Cause No. 215.

Said judgment, which enjoined appellant from converting, was rendered notwithstanding that appellant had except as prevented by injunction complied with all the rules and regulations of the Federal Home Loan Bank Board promulgated pursuant to the authority vested in said Board by Section 5 of Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended by Act of Congress, approved April 27, 1934 (48 Stat. 643, 645), and had complied with all the provisions and requirements of Section 5 of said Act, as amended, and, in particular, with the requirements of paragraph (i) of Section 5 of said Act of Congress, as amended, which empowered any member of a Federal Home Loan Bank to convert itself into a federal savings and loan association, upon a vote of 51 percentum or more of the votes case at a legal meeting called to consider such action and notwithstanding that appellant was a member of the Federal Home Loan Bank of Chicago, and had been granted permission to so convert, and its stockholders, at a legal meeting called for such purpose, had by a vote of more than 51 percentum of the votes cast, voted to so convert.

By such decision there was drawn in question the validity of a statute of the United States, to-wit, Section 5 of the Act of Congress approved June 13, 1933 (48 Stat. 128, 132), as amended by Act of Congress, approved April 27, 1934 (48 Stat. 643, 645), and particularly paragraph (i) of Section 5 of said Act of Congress, as amended, and the decision of the Supreme Court of the State of Wisconsin, was against the validity of such statute of the United States.

There was specifically set up and claimed by appellant certain titles, rights, privileges and immunities under said statute of the United States and said decision denies such titles, rights, privileges and immunities claimed under said statute of the United States.

Said decision held that appellant had no power under the statutes or Constitution of the State of Wisconsin, to divest itself of the corporate character derived from said sovereign State by accepting a charter from any other sovereign government, to-wit, the government of the United States of America, notwithstanding the fact that, under Section 2 of Article VI of the Constitution of the United States, Section 5 of Home Owners' Loan Act of 1933, as amended, is the supreme law of the land. Such holding drew in question the validity of the statutes and the Constitution of the State of Wisconsin on the ground that they were repugnant to the Constitution and laws of the United States and such holding was in favor of their validity.

The Supreme Court of the State of Wisconsin is the highest court in Wisconsin in which a decision in the case may be had.

E.

Cases Believed to Sustain Jurisdiction.

Thomas Murdock et al. v. *The Mayor and Aldermen of Memphis et al.*, 87 U. S. (20 Wall.) 590.

Fox River Paper Company v. *Railroad Commission of Wisconsin*, 274 U. S. 651.

Coleman J. Ward et al. v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17.

Missouri, Kansas and Texas Railway Company v. *John S. Elliott*, 184 U. S. 530.

State of California v. *Deseret Water, Oil and Irrigation Company*, 243 U. S. 415.

Mallinckrodt Chemical Works v. *State of Missouri*, at the relation of Seebert G. Jones, 238 U. S. 41.

Hall Neilson v. *Clark B. Lagow et al.*, 53 U. S. (12 How.) 98.

Columbia Water Power Company v. *Columbia Electric Street Railway, Light and Power Company*, 172 U. S. 475.

Jacob M. Dickinson v. *George C. Stiles*, 246 U. S. 631.

Dahnke-Walker Milling Company v. *C. T. Bondurant*, 257 U. S. 282.

Samuel H. Leathe v. *Edward L. Thomas*, 207 U. S. 93.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 237 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925 (43 Stat. 936; U. S. C., Title 28, section 344) and as further amended by the Act of Congress approved January 31, 1928 (45 Stat. 54; U. S. C. Supp., Title 28, section 861-a) and April 26, 1928 (45 Stat. 466; U. S. C. Supp., Title 28, section 861-b).

Respectfully submitted,

JOHN H. SCHLINTZ,
Attorney for Plaintiff and Appellant.

EMERY J. WOODALL,
LYMAN W. SHERWOOD,
Of Counsel.

[Endorsed:] In the Supreme Court of the United States, —— Term, 1935. Northern Building and Loan Assn., a Corporation, Plaintiff and Appellant, vs. Peter Cleary et al., Defendants and Appellees. Petition for Appeal, Order Allowing Appeal, Assignments of Error and Statement as to Jurisdiction. Filed May 1, 1935. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 970

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET. AL.,

Appellants,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET. AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANTS' BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

EMERY J. WOODALL,
B. F. SALTZSTEIN,
E. J. GROSS,
LYMAN W. SHERWOOD,
Counsel for Appellants.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANTS' BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now come the appellants and take issue with appellees' Motion to Dismiss or Affirm and respectfully show to this Honorable Court that appellees' statement opposing jurisdiction is without merit.

Nature of the Action and Ruling Below.

Appellants adopt as their statement of the Nature of the Case and Ruling Below the statement as set forth in Section D of their Statement of Jurisdiction heretofore filed with the Clerk of this Honorable Court, in which appellants showed that, pursuant to the authority contained in Section 5 (i) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 128, 134; 646), which provides as follows:

> "(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

appellant association, which was a member of the Federal Home Loan Bank of Chicago, at a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, obtained the requisite vote to convert itself into a Federal savings and loan association, and under the rules and regulations of the Federal Home Loan Bank Board did so convert.

Appellees as the Banking Commission of the State of Wisconsin brought an original action in the Supreme Court of said State to obtain a declaration that such conversion was null, void and of no effect and that appellant association was still under the jurisdiction of said Banking Commission; and to obtain an order compelling the officers and directors of appellant association to operate said as-

sociation as a Wisconsin building and loan association or to wind up its affairs in the manner provided by the statutes of the State of Wisconsin and restraining and enjoining appellants from operating appellant association as a Federal savings and loan association.

The opinion of the Supreme Court of the State of Wisconsin, filed December 11, 1934, is found in Volume 257 of the Northwestern Reporter, at page 684. The Supreme Court of the State of Wisconsin granted to the Banking Commission the judgment prayed for and issued, pursuant thereto, its order restraining and enjoining appellant association from operation as a Federal savings and loan association and compelling the officers and directors of said association to operate said association as a Wisconsin building and loan association or to wind up its affairs as such association in the manner provided by the statutes of the State of Wisconsin.

From such decision of the Supreme Court of the State of Wisconsin appellants herein appealed to this Honorable Court, said appeal being docketed in the October Term, 1934, as Cause No: 970.

Whereupon, appellees, by Motion to Dismiss or Affirm and Statement Opposing Jurisdiction, filed May 16, 1935, attacked the jurisdiction of this Honorable Court and, in reply thereto, appellants show as follows:

Summary of Argument.

POINT 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

POINT 2. The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellants under a statute of the United States.

POINT 3. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

POINT 4. There was drawn in question the validity of a statute of the United States, and the decision of the Supreme Court of the State of Wisconsin was against its validity.

ARGUMENT.

POINT 1.

The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

The Supreme Court of the State of Wisconsin, on page 689 of the report of the case in 257 Northwestern Reporter, made the following statement:

> "First. Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest the respondents with corporate power essential to a transmutation?"

The court, at the next paragraph, stated in reply to this question:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It

> does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. * * *"

It is clear, therefore, that the Home Owners' Loan Act of 1933, as amended, was before the court and was construed by it, and further

POINT 2.

The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellants under a statute of the United States.

Inasmuch as appellants claimed that by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, they had the right to convert into a Federal Savings and Loan Association and had, in fact, already so converted, the decision holding the conversion of appellant association null, void and of no effect and that appellant association was still under the jurisdiction of the Wisconsin Banking Commission necessarily denied this right, together with the titles, rights, privileges and immunities which accrued to appellants as a Federal savings and loan association through and because of such conversion. By its injunction restraining and enjoining appellant association from operating as a Federal savings and loan association and compelling appellant officers and directors of said association to operate said association as a Wisconsin building and loan association or to wind up its affairs as such association in the manner provided by the statutes of the State of Wisconsin, said court denied titles, rights, privileges and immunities which had been granted and provided for appellants by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended; and by such holding and injunction

denied a means set up and created by the Federal Congress for the conversion of State chartered members of Federal Home Loan Banks into federal savings and loan associations. Such decision was made in spite of the fact that there was presented to said court the case of *Casey v. Galli*, 94 U. S. 673, wherein the Supreme Court of the United States, by Mr. Justice Swayne, stated at page 686:

> "No authority from the State was necessary to enable the Bank so to change its organization. The option to do that was given by the 44th section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

The decision was reached in passing upon a statute containing (Section 44 of the National Bank Act, 13 Stat. 44, 112), a grant of the power of conversion into national banks which was in language so similar to the conversion language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, that for the purpose of consideration of the legal result intended, no different conclusion could be reasonably reached. We, therefore, contend that by this decision of said highest court Federal titles, rights, privileges and immunities were denied appellants and an important Federal question decided in a manner entirely adverse to the obvious intent of the Congress in enacting such statute and further, in direct opposition to the customary, distinct and reasonable meaning of the words of the statute itself. We further show this Honorable Court that, as of May 21, 1935, there was invested in the shares of Federal savings and loan associations by the United States Treasury, as is shown by the records of the Federal Home Loan Bank Board, the total sum of $25,034,300.00, of which

amount a total sum of $11,209,300.00 was invested in 254 associations which had converted into Federal savings and loan associations under authority of Section 5(i) of the Home Owners' Loan Act of 1933, as amended, the status of which sum is greatly endangered by the decision of the Supreme Court of the State of Wisconsin.

POINT 3.

There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

The court stated, on page 686, that: "The cause was first submitted upon arguments and briefs * * * as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute * * *".

It then went on to say: "We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the State of power over corporate charters * * *. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a Federal savings and loan association under the Federal Act."

After some further discussion the court, at the top of page 687, held as follows:

> "Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign

> State by accepting a charter from any other sovereign government. Our Constitution, section 1, Art. 11, provides: 'All general laws or special acts enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage.'"

We contend that this definite holding by the Supreme Court of the State of Wisconsin sustained the validity of a State law which was drawn in question on the grounds of its repugnancy to the Constitution and a law of the United States, to-wit, Article VI of the United States Constitution providing that: "This Constitution and the laws of the United States which shall be made in pursuance thereof • • • shall be the supreme law of the land", and Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. As will be noted from the court's statement, the "power of Congress to supersede the authority of the State" was squarely before the court and considered in connection with a State law and the State constitution. The court determined that the State law did not allow State building and loan associations to transmute; although appellants did claim that such right was granted by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the court flatly ruled that the State law denied to appellants the right so set up and claimed, i.e., to convert. The following statements made by appellees in Subdivisions II and III of their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, are without foundation and based on a mistaken concept of the case:

> II. "There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."
>
> III. "The appellants at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin."

Point 4.

There was drawn in question the validity of a statute of the United States and the decision of the Supreme Court of the State of Wisconsin was against its validity.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provides:

> "Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; * * *."

Appellant association was such a member, it held a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, and at such meeting the required vote was cast. We contend that appellant association "under this Act" became a Federal savings and loan association and that the injunction issued by the Supreme Court of the State of Wisconsin necessarily draws in question the validity of said statute of the United States and is against its validity because, by authority of said court, appellant association is restrained from being a Federal savings and loan association. The effect of the injunction necessarily destroys the effectiveness and validity of said Federal statute. Whatever words said court may have used in explaining its action, the effect of its action destroyed the conversion of appellant association, and thus destroyed the statute. If Congress had power to enact such law, said court has no power to destroy such law.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provided a method whereby appellant association could become a Federal savings and loan association and under said Act appellant association became a Federal sav-

ings and loan association. The injunction of said Court destroyed the legal means created by the Federal Congress. In law, as in life, actions speak louder than words; the action of said highest court was against the validity of the means and prevented the legal result created by the Federal Congress and by such action, in fact, denied the validity of such Federal Act.

Section 5 (i) of said Federal Act provides that *any* member of a Federal Home Loan Bank may convert itself. It does not contain any words of limitation. It clearly provides that all members of Federal Home Loan Banks may convert. The Supreme Court of the State of Wisconsin stated, at page 689:

> "The act was intended to be administered in forty-eight States and applies to corporations operating under different degrees of State control and with different powers."

Such language should have suggested to the court the plain meaning of the statute.

The following statement of said court that:

> "It does no more than to afford consent applicable to corporations having power to transmute."

is, therefore, a clear mistake. The Federal Congress said *any* member of a Home Loan Bank may convert. Said court held that only such members of Federal Home Loan Banks are permitted to convert as have been given power to convert by their respective State legislatures. Such holding is not interpretation, it is not construction, it is nullification of a Federal statute. The Federal statute does not speak in terms of "power" or "permission"; it created legal means and legal effect, to-wit, conversion of *any* member of a Federal Home Loan Bank into a Fed-

eral savings and loan association. The injunction which denies and destroys such legal effect speaks louder than the opinion which spoke in terms of interpretation and construction. The Federal statute expressly provides the sole means by which *any* member may convert, to-wit, "51 per centum or more of the votes cast at a legal meeting called to consider such action." The Supreme Court of the State of Wisconsin added to such statute, by its injunction and its decision, a new and unwarranted condition, that a member of a Federal Home Loan Bank, to-wit, appellant association, must obtain the enactment of a statute in Wisconsin authorizing appellant association to take advantage of the Federal grant of "power" and "permission" in order to use the means and obtain the legal effect created by Congress, i. e., conversion. The imposition of such burdensome condition which Congress had not required is an attempt by said Court to exercise legislative power which resides in the Federal Congress. It is the repeal of the statute enacted by Congress and the attempt to enact a new and different statute. The prevention by said court of the legal result created by the Federal Congress, because of failure by appellant association to fulfill such new and unreasonable condition, cannot be termed mere construction or interpretation of a Federal statute, but must be viewed as a destruction of its validity. Although in form the court has interpreted the Federal statute, the result and force of its decision and injunction denied the validity of such statute.

Said court in the following language clearly indicates that it has adopted a strained and mistaken interpretation of Section 5 (i) of Home Owners' Loan Act of 1933, as amended:

> "If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or

definition of the conditions under which transmutation will be permitted, so far as the Federal government is concerned, without purporting to increased corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin by power reserved in its constitution, has retained control over corporations under its laws, and since the State undoubtedly had plenary powers, both of organization and control, prior to this act, *it cannot be ousted by any act of Congress from these powers* (italics ours); that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders *would be an impairment of the contract rights of stockholders in a Wisconsin corporation* (italics ours). That there are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find."

Such language of said highest court, taken in connection with the injunction issued by it, demonstrates clearly the following bases for this appeal:

1. Said highest court held Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, invalid.

2. It adopted the form of construing the Act in order to avoid expressly holding the statute invalid.

The Supreme Court of the State of Wisconsin attempts to avoid passing upon the serious constitutional objections which it states would be raised by refusing to hold that Congress intended what its statute provided, to-wit, that *any* member of a Federal Home Loan Bank may convert itself into a federal savings and loan association, and what the Supreme Court of the United States (in *Casey* v. *Galli, supra*) said practically the same words (in the National Banking Act, 13 Stat. 112) meant, to-wit, the act is silent as to any assent or permission by the State. No authority from the State is necessary to enable *any* member of a Federal Home Loan Bank so to change its organization. The option to do that was given in Section 5 (i) of Home Owners' Loan Act of 1933, as amended. The power there conferred was ample. It endeavored to avoid the solution of these objections by stating that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, should "contain the clearest sort of language to warrant the contention asserted by" appellant association (257 N. W. 690). We contend that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, does now contain the clearest sort of language to warrant validity of conversion, to-wit, "any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association *under this Act.*" (Italics ours.)

Said highest court wholly ignored that such conversion by the express provisions of Section 5 (i) was to take place "under this Act."

As aforesaid, the Supreme Court of the State of Wisconsin had before it the decision in the case of *Casey* v.

Galli, supra, in which the Supreme Court of the United States held:

(1) That no authority from a State was necessary to enable a State bank to convert itself into a national bank;

(2) That the Federal statute (Sec. 44 of the National Banking Act, 13 Stat. 112), conferred ample power;

(3) That the validity of such act could be not doubted;

(4) That the act was silent with respect to consent or permission on the part of the State. In that regard the court said:

> "It was as competent for Congress to authorize the transmutation as to create such institutions originally."

Such decision interpreting the National Banking Act, 13 Stat. 112, compelled the Supreme Court of the State of Wisconsin to recognize that the words "any bank • • • may • • • become a national association" had been interpreted by the Supreme Court of the United States as meaning a grant of right, power, privilege and immunity to convert without regard to State laws. In *Casey* v. *Galli, supra,* the Supreme Court of the United States had not required the additional condition that the law of the State of Louisiana be amended so as to authorize the bank to convert; it had not held that the Federal statute did no more than to afford consent applicable to corporations which had obtained power from state law to transmute.

In *Fox River Paper Co.* v. *Railroad Commission of Wisconsin* (274 U. S. 651), it was held that whether a State court, in basing its decision on non-federal grounds, has thereby sought to evade a constitutional issue, is a question on which the litigant is entitled to invoke the judgment of the Supreme Court of the United States.

In *Leathe* v. *Thomas* (207 U. S. 93, 99), the Court stated:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

Indeed, as was held in the cases of *Neilson* v. *Lagow* (53 U. S. (12 How) 98); *Klinjer* v. *Missouri* (80 U. S. (13 Wall.) 257) and *Ward* v. *Love County* (253 U. S. 17), non-federal grounds put forward by a highest State court, which are plainly untenable, will not preclude the Supreme Court of the United States from taking jurisdiction; it will be presumed that the State court based its judgment on the Federal grounds in question.

The Supreme Court of the State of Wisconsin attempted to avoid the force of the interpretation of language in the National Banking Act which is almost identical to the language under consideration in Section 5 (i) of the Home Owners' Loan Act by establishing an incorrect distinction between banks on the one hand and building and loan associations on the other. It stated in its opinion, page 690:

> "Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to domestic corporations organized under State law * * *. This act constituted an unmistakable investiture of corporate power upon State banks."

It refused to recognize the power of Congress to invest State building and loan associations with such power on the grounds that:

> "They are not banks; they have not banking powers or privileges under our State law." (Page 686.)

It is apparent that the reason for the distinction made by the Supreme Court of the State of Wisconsin between banks and building and loan associations was that said court did not believe that Congress had power to invest State building and loan associations with corporate power to convert without regard to State laws as Congress had invested State banks with such power. It is therefore perfectly apparent that the effect of the decision and injunction of the Supreme Court of the State of Wisconsin is the invalidation of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. The Supreme Court of the State of Wisconsin has made it plain, therefore, on the face of its decision, that the reason for its decision and for its injunction is that said court does not believe that Congress had constitutional power to enact said Section 5 (i).

Although the court stated, at page 689:

> "Second, if it be found that it was the purpose of Congress by that act thus to increase respondent's corporate powers, then, has Congress the power to accomplish this result?
>
> "We are not treating specifically the second question for reasons pointedly set forth, • • •."

said court did not refrain from answering said second question but, in fact, based its decision and its injunction upon a negative answer to such question.

It therefore seems plain that the Supreme Court of the State of Wisconsin erred:

(1) In refusing the authority of *Casey* v. *Galli*, *supra*, as to the validity of the Federal statute providing for conversion;

(2) As to the clear and unmistakable meaning of almost identical statutory language authoritatively construed by this Honorable Court as was clearly pointed out to it by appellant association, and

(3) By its injunction, which, in fact, destroyed the legal result and the validity of a Federal statute.

WHEREFORE, appellants respectfully submit that appellees' Motion to Dismiss or Affirm the decision of the Supreme Court of the State of Wisconsin should be denied; that appellees' Statement in Opposition to Jurisdiction is without merit and should be disregarded; that this Honorable Court has jurisdiction to hear this appeal under Section 237 (a) of the Judicial Code (28 U. S. C. 344(a)); that this Honorable Court should hear appellants' appeal upon its merits. In any event, appellants submit that a substantial and important Federal question is presented; that certain titles, rights, privileges and immunities specially set up and claimed by appellants under a statute of the United States, to-wit, Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, were denied, and further submit that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of Section 237 (b) and (c) of the Judicial Code (28 U. S. C. 344 (b), (c)).

Respectfully submitted,

EMERY J. WOODALL,
Attorney for Appellants.

B. F. SALTZSTEIN,
E. J. GROSS,
LYMAN W. SHERWOOD,
By EMERY J. WOODALL,
Of Counsel.

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MAY 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 971

RELIANCE BUILDING AND LOAN ASSOCIATION,
Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

EMERY J. WOODALL,
WALLACE REISS,
LYMAN W. SHERWOOD,
Counsel for Appellant.

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A CORPORATION,
Appellant,

vs.

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Appellees.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now comes the appellant and takes issue with appellees' Motion to Dismiss or Affirm and respectfully shows to this Honorable Court that appellees' statement opposing jurisdiction is without merit.

Nature of the Action and Ruling Below.

Appellant adopts as its statement of the Nature of the Case and Ruling Below the statement as set forth in Section D of its statement of jurisdiction heretofore filed with the Clerk of this Honorable Court, in which appellant showed that, pursuant to the authority contained in Section 5 (i) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 128, 134; 646), which provides as follows:

> "(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

Appellant, which was a member of the Federal Home Loan Bank of Chicago, at a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, obtained the requisite vote to convert itself into a Federal savings and loan association.

Appellant herein, by its original action, brought in the Circuit Court of Milwaukee County, State of Wisconsin, against appellees herein, obtained a decision holding that appellant had the right and power to convert into a Federal savings and loan association; that the Acts of Congress providing for such conversion were valid and constitutional; that appellees herein had no right or authority to take possession of appellant to prevent its conversion into a Federal savings and loan association, and obtained

an injunction restraining and enjoining appellees herein from taking possession of or interfering with the proposed conversion of appellant into a Federal savings and loan association.

Appellees thereupon appealed to the Supreme Court of the State of Wisconsin. Said Supreme Court reversed the decision of said Circuit Court and granted the relief sought by appellees in their counterclaim, to-wit, a writ of injunction restraining and enjoining appellant from taking any other or further steps to convert itself into a Federal saving and loan association; and a decision that appellees had full power and authority to take possession of appellant under the laws of the State of Wisconsin.

The opinion of the Supreme Court of the State of Wisconsin, filed December 11, 1934, is found in Volume 257 of the Northwestern Reporter, at page 684.

From the final decision of the Supreme Court of the State of Wisconsin appellant herein appealed to this Honorable Court, said appeal being docketed in the October Term, 1934, as Cause No. 971.

Whereupon, appellees, by Motion to Dismiss or Affirm and Statement Opposing Jurisdiction, filed May 16, 1935, attacked the jurisdiction of this Honorable Court and, in reply thereto, appellant shows as follows:

Summary of Argument.

POINT 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

POINT 2. The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

POINT 3. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its be-

ing repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

POINT 4. There was drawn in question the validity of a statute of the United States, and the decision of the Supreme Court of the State of Wisconsin was against its validity.

ARGUMENT.

POINT 1.

The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

The Supreme Court of the State of Wisconsin, on page 689 of the report of the case in 257 Northwestern Reporter, made the following statement:

> "First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest the respondents with corporate power essential to a transmutation?"

The court, at the next paragraph, stated in reply to this question:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corpora-

tions with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. * * *"

It is clear, therefore, that the Home Owners' Loan Act of 1933, as amended, was before the court and was construed by it, and further

POINT 2.

The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

Inasmuch as appellant claimed that by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, it had the right to convert into a Federal savings and loan association, the decision of said court holding that appellees had full power and authority to take possession of appellant necessarily denied this right, together with the titles, rights, privileges and immunities which would accrue to appellant as a Federal savings and loan association through and because of such conversion. By its injunction restraining and enjoining appellant from converting into a Federal savings and loan association, said court denied titles, rights, privileges and immunities which had been granted and provided for appellant by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended; and by such holding and injunction denied a means set up and created by the Federal Congress for the conversion of State chartered members of Federal Home Loan Banks into Federal savings and loan associations. Such decision was made in spite of the fact that there was presented to said court the case of *Casey* v. *Galli*, 94 U. S. 673, wherein

the Supreme Court of the United States, by Mr. Justice Swayne, stated at page 686:

> "No authority from the State was necessary to enable the Bank so to change its organization. The option to do that was given by the 44th section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

This decision was reached in passing upon a statute containing (Section 44 of the National Bank Act, 13 Stat. 44, 112), a grant of the power of conversion into national banks which was in language so similar to the conversion language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, that for the purpose of consideration of the legal result intended, no different conclusion could be reasonably reached. We therefore contend that by this decision of said highest court Federal titles, rights, privileges and immunities were denied appellant and an important Federal question decided in a manner entirely adverse to the obvious intent of the Congress in enacting such statute and, further, in direct opposition to the customary, distinct and reasonable meaning of the words of the statute itself. We further show this Honorable Court that, as of May 21, 1935, there was invested in the shares of Federal savings and loan associations by the United States Treasury, as is shown by the records of the Federal Home Loan Bank Board, the total sum of $25,034,300.00, of which amount a total sum of $11,209,300.00 was invested in 254 associations which had converted into Federal savings and loan associations under authority of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the status

of which sum is greatly endangered by the decision of the Supreme Court of the State of Wisconsin.

POINT 3.

There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

The court stated, on page 686, that: "The cause was first submitted upon arguments and briefs * * * as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute * * *".

It then went on to say: "We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the State of power over corporate charters * * *. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a Federal savings and loan association under the Federal Act."

After some further discussion the court, at the top of page 687, held as follows:

> "Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign State by accepting a charter from any other sovereign government. Our Constitution, section 1, Art. II, provides: 'All general laws or special acts enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage.'"

We contend that this definite holding by the Supreme Court of the State of Wisconsin sustained the validity of a State law which was drawn in question on the grounds of its repugnancy to the Constitution and a law of the United States, to-wit, Article VI of the United States Constitution providing that: "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land", and Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. As will be noted from the court's statement, the "power of Congress to supersede the authority of the State" was squarely before the court and considered in connection with a State law and the State constitution. The court determined that the State law did not allow State building and loan associations to transmute; although appellant did claim that such right was granted by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the court flatly ruled that the State law denied to appellant the right so set up and claimed, i.e., to convert. The following statements made by appellees in Subdivisions II and III of their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm are without foundation and based on a mistaken concept of the case:

> II. "There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."
>
> III. "The appellant at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin."

Point 4.

There was drawn in question the validity of a statute of the United States and the decision of the Supreme Court of the State of Wisconsin was against its validity.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provides:

> "Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 percentum or more of the votes cast at a legal meeting called to consider such action; * * *."

Appellant was such a member, it held a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, and at such meeting the required vote was cast. We contend that appellant "under this Act" was entitled to convert into a Federal savings and loan association and that the injunction issued by the Supreme Court of the State of Wisconsin necessarily draws in question the validity of said statute of the United States and is against its validity because, by authority of said court, appellant is restrained from converting into a Federal savings and loan association. The effect of the injunction necessarily destroys the effectiveness and validity of said Federal statute. Whatever words said court may have used in explaining its action, the effect of its action destroyed the conversion of appellant, and thus destroyed the statute. If Congress had power to enact such law, said court has no power to destroy such law.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provided a method whereby appellant could become a Federal savings and loan association and under said Act appellant fulfilled all requirements and conditions of said Section 5 (i) and all rules and regulations of the

Federal Home Loan Bank Board promulgated thereunder prerequisite to conversion and, but for said injunction and decision, would be a Federal savings and loan association. The injunction of said court destroyed the legal means created by the Federal Congress. In law, as in life, actions speak louder than words; the action of said highest court was against the validity of the means and prevented the legal result created by the Federal Congress and by such action, in fact, denied the validity of such Federal Act.

Section 5 (i) of said Federal Act provides that *any* member of a Federal Home Loan Bank may convert itself. It does not contain any words of limitation. It clearly provides that all members of Federal Home Loan Banks may convert. The Supreme Court of the State of Wisconsin stated, at page 689:

> "The act was intended to be administered in forty-eight States and applies to corporations operating under different degrees of State control and with different powers."

Such language should have suggested to the court the plain meaning of the statute. The following statement of said court that:

> "It does no more than to afford consent applicable to corporations having power to transmute."

is, therefore, a clear mistake. The Federal Congress said *any* member of a Home Loan Bank may convert. Said court held that only such members of Federal Home Loan Banks are permitted to convert as have been given power to convert by their respective State legislatures. Such holding is not interpretation, it is not construction; it is nullification of a Federal statute. The Federal statute does not speak in terms of "power" or "permission"; it created legal means and legal effect, to-wit, conversion of

any member of a Federal Home Loan Bank into a Federal savings and loan association. The injunction which denies and destroys such legal effect speaks louder than the opinion which spoke in terms of interpretation and construction. The Federal statute expressly provides the sole means by which *any* member may convert, to-wit, "51 per centum or more of the votes cast at a legal meeting called to consider such action". The Supreme Court of the State of Wisconsin added to such statute, by its injunction and its decision, a new and unwarranted condition, that a member of a Federal Home Loan Bank, to-wit, appellant, must obtain the enactment of a statute in Wisconsin authorizing appellant to take advantage of the Federal grant of "power" and "permission" in order to use the means and obtain the legal effect created by Congress, i. e., conversion. The imposition of such burdensome condition, which Congress had not required, is an attempt by said Court to exercise legislative power which resides in the Federal Congress. It is the repeal of the statute enacted by Congress and the attempt to enact a new and different statute. The prevention by said court of the legal result created by the Federal Congress, because of failure by appellant to fulfill such new and unreasonable condition, cannot be termed mere construction or interpretation of a Federal statute, but must be viewed as a destruction of its validity. Although in form the court has interpreted the Federal statute, the result and force of its decision and injunction denied the validity of such statute.

Said court in the following language clearly indicates that it has adopted a strained and mistaken interpretation of Section 5 (i) of Home Owners' Loan Act of 1933, as amended:

> "If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will

be permitted, so far as the Federal government is concerned, without purporting to increase corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so constructed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin by power reserved in its constitution, has retained control over corporations under its laws, and since the State undoubtedly had plenary powers, both of organization and control, prior to this act, *it cannot be ousted by any act of Congress from these powers* (italics ours); that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders *would be an impairment of the contract rights of stockholders in a Wisconsin corporation* (italics ours). That there are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find."

Such language of said highest court, taken in connection with the injunction issued by it, demonstrates clearly the following bases for this appeal:

1. Said highest court held Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, invalid.

2. It adopted the form of construing the Act in order to avoid expressly holding the statute invalid.

The Supreme Court of the State of Wisconsin attempts to avoid passing upon the serious constitutional objections which it states would be raised by refusing to hold that Congress intended what its statute provided, to-wit, that *any* member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association, and what the Supreme Court of the United States (in *Casey* v. *Galli, supra*) said practically the same words (in the National Banking Act, 13 Stat. 112) meant, to-wit, the act is silent as to any assent or permission by the State. No authority from the State is necessary to enable *any* member of a Federal Home Loan Bank so to change its organization. The option to do that was given by Section 5 (i) of Home Owners' Loan Act of 1933, as amended. The power there conferred was ample. It endeavored to avoid the solution of these objections by stating that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, should "contain the clearest sort of language to warrant the contention asserted by" appellant association (257 N. W. 690). We contend that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, does now contain the clearest sort of language to warrant validity of conversion, to-wit, "any member of a Federal Home Loan Bank may convert itself into Federal Savings and Loan Association *under this Act.*" (Italics ours.)

Said highest court wholly ignored that such conversion by the express provisions of Section 5 (i) was to take place "under this Act."

As aforesaid, the Supreme Court of the State of Wisconsin had before it the decision in the case of *Casey* v. *Galli, supra,* in which the Supreme Court of the United States held:

(1) That no authority from a State was necessary to enable a State bank to convert itself into a national bank;

(2) That the Federal statute (Sec. 44 of the National Banking Act, 13 Stat. 112), conferred ample power;

(3) That the validity of such act could not be doubted;

(4) That the act was silent with respect to consent or permission on the part of the State. In that regard the court said:

> "It was as competent for Congress to authorize the transmutation as to create such institutions originally."

Such decision interpreting the National Banking Act, 13 Stat. 112, compelled the Supreme Court of the State of Wisconsin to recognize that the words "any bank • • • may • • • become a national association" had been interpreted by the Supreme Court of the United States as meaning a grant of right, power, privilege and immunity to convert without regard to State laws. In *Casey* v. *Galli*, *supra*, the Supreme Court of the United States had not required the additional condition that the law of the State of Louisiana be amended so as to authorize the bank to convert; it had not held that the Federal statute did no more than to afford consent applicable to corporations which had obtained power from State law to transmute.

In *Fox River Paper Co.* v. *Railroad Commission of Wisconsin* (274 U. S. 651), it was held that whether a State court, in basing its decision on non-Federal grounds, has thereby sought to evade a constitutional issue, is a question on which the litigant is entitled to invoke the judgment of the Supreme Court of the United States.

In *Leathe* v. *Thomas* (207 U. S. 93, 99), the court stated:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of

argument, that it might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

Indeed, as was held in the cases of *Neilson* v. *Lagow* (53 U. S. (12 How.) 98); *Klinjer* v. *Missouri* (80 U. S. (13 Wall.) 257) and *Ward* v. *Love County* (253 U. S. 17), non-Federal grounds put forward by a highest State court, which are plainly untenable, will not preclude the Supreme Court of the United States from taking jurisdiction; it will be presumed that the State court based its judgment on the Federal grounds in question.

The Supreme Court of the State of Wisconsin attempted to avoid the force of the interpretation of language in the National Banking Act which is almost identical to the language under consideration in Section 5 (i) of the Home Owners' Loan Act by establishing a false distinction between banks on the one hand and building and loan associations on the other. It stated in its opinion, page 690:

"Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to domestic corporations organized under State law * * *. This act constituted an unmistakable investiture of corporate power upon State banks."

It refused to recognize the power of Congress to invest State building and loan associations with such power on the grounds that:

"They are not banks; they have not banking powers or privileges under our State law." (Page 686.)

It is apparent that the reason for the distinction made by the Supreme Court of the State of Wisconsin between banks and building and loan associations was that said court did not believe that Congress had power to invest State building and loan associations with corporate power to convert without regard to State laws as Congress had invested State banks with such power. It is therefore perfectly apparent that the effect of the decision and injunction of the Supreme Court of the State of Wisconsin is the invalidation of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. The Supreme Court of the State of Wisconsin has made it plain, therefore, on the face of its decision, that the reason for its decision and for its injunction is that said court does not believe that Congress had constitutional power to enact said Section 5 (i).

Although the court stated, at page 689:

> "Second, if it be found that it was the purpose of Congress by that act thus to increase respondent's corporate powers, then, has Congress the power to accomplish his result?
>
> "We are not treating specifically the second question for reasons pointedly set forth, * * *."

said court did not refrain from answering said second question but, in fact, based its decision and its injunction upon a negative answer to such question.

It therefore seems plain that the Supreme Court of the State of Wisconsin erred:

(1) In refusing the authority of *Casey* v. *Galli, supra,* as to the validity of the Federal statute providing for conversion;

(2) As to the clear and unmistakable meaning of almost identical statutory language authoritatively construed by this Honorable Court, as was clearly pointed out to it by appellant, and

(3) By its injunction, which, in fact, destroyed the legal result and the validity of a Federal statute.

WHEREFORE, appellant respectfully submits that appellees' Motion to Dismiss or Affirm the decision of the Supreme Court of the State of Wisconsin should be denied; that appellees' Statement in Opposition to Jurisdiction is without merit and should be disregarded; that this Honorable Court has jurisdiction to hear this appeal under Section 237 (a) of the Judicial Code (28 U. S. C. 344(a)); that this Honorable Court should hear appellant's appeal upon its merits. In any event, appellant submits that a substantial and important Federal question is presented; that certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States, to-wit, Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, were denied, and further submits that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of Section 237 (b) and (c) of the Judicial Code (28 U. S. C. 344 (b), (c)).

Respectfully submitted,

EMERY J. WOODALL,
Attorney for Appellants.

WALLACE REISS,
LYMAN W. SHERWOOD,
By EMERY J. WOODALL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972 57

NORTHERN BUILDING AND LOAN ASSOCIATION,
Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH,
AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT
OF THE STATE OF WISCONSIN, ET. AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

EMERY J. WOODALL,
JOHN H. SCHLINTZ,
LYMAN W. SHERWOOD,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Plaintiff and Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF THE BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Defendants and Appellees.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now comes the appellant and takes issue with appellees' Motion to Dismiss or Affirm and respectfully shows to this Honorable Court that appellees' statement opposing jurisdiction is without merit.

Nature of the Action and Ruling Below.

Appellant adopts as its statement of the Nature of the Case and Ruling Below the statement as set forth in Section D of its Statement of Jurisdiction heretofore filed with the Clerk of this Honorable Court, in which appellants showed that, pursuant to the authority contained in Section 5 (i) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 128, 134; 646), which provides as follows:

> "(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted associaton shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

appellant, which was a member of the Federal Home Loan Bank of Chicago, at a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, obtained the requisite vote to convert itself into a Federal savings and loan association.

Appellant herein by its original action, brought in the Circuit Court of Milwaukee County, State of Wisconsin, against appellees herein, obtained a decision holding that appellant had the right and power to convert into a Federal savings and loan association, that the Acts of Congress providing for such conversion were valid and constitutional, that appellees herein had no right or authority to take possession of appellant to prevent its conversion into a Federal savings and loan association, and obtained

an injunction restraining and enjoining appellees herein from taking possession of or interfering with the proposed conversion of appellant into a Federal savings and loan association.

Appellees thereupon appealed to the Supreme Court of the State of Wisconsin. Said Supreme Court reversed the decision of said Circuit Court and granted the relief sought by appellees in their counterclaim, to-wit, a writ of injunction restraining and enjoining appellant from taking any other or further steps to convert itself into a Federal savings and loan association; and a decision that appellees had full power and authority to take possession of appellant under the laws of the State of Wisconsin.

The opinion of the Supreme Court of the State of Wisconsin, filed December 11, 1934, is found in Volume 257 of the Northwestern Reporter, at page 684.

From the final decision of the Supreme Court of the State of Wisconsin appellant herein appealed to this Honorable Court, said appeal being docketed in the October Term, 1934, as Cause No. 972.

Whereupon appellees, by Motion to Dismiss or Affirm and Statement Opposing Jurisdiction, filed May 16, 1935, attacked the jurisdiction of this Honorable Court and in reply thereto, appellant shows as follows:

Summary of Argument.

POINT 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

POINT 2. The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

POINT 3. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its be-

ing repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

POINT 4. There was drawn in question the validity of a statute of the United States, and the decision of the Supreme Court of the State of Wisconsin was against its validity.

ARGUMENT.

POINT 1.

The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

The Supreme Court of the State of Wisconsin, on page 689 of the report of the case in 257 Northwestern Reporter, made the following statement:

> "First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest the respondents with corporate power essential to a transmutation?"

The court, at the next paragraph, stated in reply to this question:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corpora-

> tions with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. • • •"

It is clear, therefore, that the Home Owners' Loan Act of 1933, as amended, was before the Court and was construed by it, and further

POINT 2.

The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

Inasmuch as appellant claimed that by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, it had the right to convert into a Federal savings and loan association, the decision of said court holding that appellees had full power and authority to take possession of appellant necessarily denied this right, together with the titles, rights, privileges and immunities which would accrue to appellant as a Federal savings and loan association through and because of such conversion. By its injunction restraining and enjoining appellant from converting into a Federal savings and loan association, said court denied titles, rights, privileges and immunities which had been granted and provided for appellant by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended; and by such holding and injunction denied a means set up and created by the Federal Congress for the conversion of State chartered members of Federal Home Loan Banks into Federal savings and loan associations. Such decision was made in spite of the fact that there was presented to said court the case of *Casey* v. *Galli*, 94 U. S. 673, wherein the Supreme

Court of the United States, by Mr. Justice Swayne, stated at page 686:

> "No authority from the State was necessary to enable the Bank so to change its organization. The option to do that was given by the 44th section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

This decision was reached in passing upon a statute containing (Section 44 of the National Bank Act, 13 Stat. 44, 112), a grant of the power of conversion into national banks which was in language so similar to the conversion language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, that for the purpose of consideration of the legal result intended, no different conclusion could be reasonably reached. We therefore contend that by this decision of said highest court Federal titles, rights, privileges and immunities were denied appellant and an important Federal question decided in a manner entirely adverse to the obvious intent of the Congress in enacting such statute and further, in direct opposition to the customary, distinct and reasonable meaning of the words of the statute itself. We further show this Honorable Court that, as of May 21, 1935, there was invested in the shares of Federal savings and loan associations by the United States Treasury, as is shown by the records of the Federal Home Loan Bank Board, the total sum of $25,034,300.00, of which amount a total sum of $11,209,300.00 was invested in 254 associations which had converted into Federal savings and loan associations under authority of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the status of which sum is greatly endangered by the decision of the Supreme Court of the State of Wisconsin.

POINT 3.

There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

The court stated, on page 686, that: "The cause was first submitted upon arguments and briefs * * * as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute * * *".

It then went on to say: "We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the State of power over corporate charters * * *. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a Federal savings and loan association under the Federal Act."

After some further discussion the court, at the top of page 687, held as follows:

> "Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign State by accepting a charter from any other sovereign government. Our Constitution, section 1, Art. 11, provides: 'All general laws or special acts enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage.'"

We contend that this definite holding by the Supreme Court of the State of Wisconsin sustained the validity of a State law which was drawn in question on the grounds of its repugnancy to the Constitution and a law of the United States, to-wit, Article VI of the United States Constitution, providing that: "This Constitution and the laws of the United States which shall be made in pursuance thereof • • • shall be the supreme law of the land", and Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. As will be noted from the court's statement, the "power of Congress to supersede the authority of the State" was squarely before the court and considered in connection with a State law and the State constitution. The court determined that the State law did not allow State building and loan associations to transmute; although appellant did claim that such right was granted by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the court flatly ruled that the State law denied to appellant the right so set up and claimed, i. e., to convert. The following statements made by appellees in Subdivisions II and III of their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm are without foundation and based on a mistaken concept of the case:

> II. "There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."
>
> III. "The appellant at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin."

Point 4.

There was drawn in question the validity of a statute of the United States and the decision of the Supreme Court of the State of Wisconsin was against its validity.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provides:

> "Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 percentum or more of the votes cast at a legal meeting called to consider such action; * * *"

Appellant was such a member, it held a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, and at such meeting the required vote was cast. We contend that appellant "under this Act" was entitled to convert into a Federal savings and loan association and that the injunction issued by the Supreme Court of the State of Wisconsin necessarily draws in question the validity of said statute of the United States and is against its validity because, by authority of said court, appellant is restrained from converting into a Federal savings and loan association. The effect of the injunction necessarily destroys the effectiveness and validity of said Federal statute. Whatever words said court may have used in explaining its action, the effect of its action destroyed the conversion of appellant, and thus destroyed the statute. If Congress had power to enact such law, said court has no power to destroy such law.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provided a method whereby appellant could become a Federal savings and loan association and under said Act appellant fulfilled all requirements and conditions of said Section 5 (i) and all rules and regulations of

the Federal Home Loan Bank Board promulgated thereunder prerequisite to conversion and but for said injunction and decision, would be a Federal savings and loan association. The injunction of said court destroyed the legal means created by the Federal Congress. In law, as in life, actions speak louder than words; the action of said highest court was against the validity of the means and prevented the legal result created by the Federal Congress and by such action, in fact, denied the validity of such Federal Act.

Section 5 (i) of said Federal Act provides that *any* member of a Federal Home Loan Bank may convert itself. It does not contain any words of limitation. It clearly provides that all members of Federal Home Loan Banks may convert. The Supreme Court of the State of Wisconsin stated, at page 689:

> "The act was intended to be administered in forty-eight States and applies to corporations operating under different degrees of State control and with different powers."

Such language should have suggested to the court the plain meaning of the statute. The following statement of said court that:

> "It does no more than to afford consent applicable to corporations having power to transmute."

is, therefore, a clear mistake. The Federal Congress said *any* member of a Home Loan Bank may convert. Said court held that only such members of Federal Home Loan Banks are permitted to convert as have been given power to convert by their respective State legislatures. Such holding is not interpretation, it is not construction, it is nullification of a Federal statute. The Federal statute does not speak in terms of "power" or "permission"; it

created legal means and legal effect, to-wit, conversion of *any* member of a Federal Home Loan Bank into a Federal savings and loan association. The injunction which denies and destroys such legal effect speaks louder than the opinion which spoke in terms of interpretation and construction. The Federal statute expressly provides the sole means by which *any* member may convert, to-wit, "51 per centum or more of the votes cast at a legal meeting called to consider such action." The Supreme Court of the State of Wisconsin added to such statute, by its injunction and its decision, a new and unwarranted condition, i. e., that a member of a Federal Home Loan Bank, to-wit, appellant, must obtain the enactment of a statute in Wisconsin authorizing appellant to take advantage of the Federal grant of "power" and "permission" in order to use the means and obtain the legal effect created by Congress, i. e., conversion. The imposition of such burdensome condition which Congress had not required is an attempt by said Court to exercise legislative power which resides in the Federal Congress. It is the repeal of the statute enacted by Congress and the attempt to enact a new and different statute. The prevention by said court of the legal result created by the Federal Congress, because of failure by appellant to fulfill such new and unreasonable condition, cannot be termed mere construction or interpretation of a Federal statute, but must be viewed as a destruction of its validity. Although in form the court has interpreted the Federal statute, the result and force of its decision and injunction denied the validity of such statute.

Said court in the following language clearly indicates that it has adopted a strained and mistaken interpretation of Section 5 (i) of Home Owners' Loan Act of 1933, as amended:

> "If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or defini-

tion of the conditions under which transmutation will be permitted, so far as the Federal government is concerned, without purporting to increase corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin by power reserved in its constitution, has retained control over corporations under its laws, and since the State undoubtedly had plenary powers, both of organization and control, prior to this act, *it cannot be ousted by any act of Congress from these powers* (italics ours); that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders *would be an impairment of the contract rights of stockholders in a Wisconsin corporation* (italics ours). That there are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find."

Such language of said highest court, taken in connection with the injunction issued by it, demonstrates clearly the following bases for this appeal:

1. Said highest court held Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, invalid.

2. It adopted the form of construing the Act in order to avoid expressly holding the statute invalid.

The Supreme Court of the State of Wisconsin attempts to avoid passing upon the serious constitutional objections which it states would be raised by refusing to hold that Congress intended what its statute provided to-wit, that *any* member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association, and what the Supreme Court of the United States (in *Casey* v. *Galli, supra*) said practically the same words (in the National Banking Act, 13 Stat. 112) meant, to-wit, the act is silent as to any assent or permission by the State. No authority from the State is necessary to enable any member of a Federal Home Loan Bank so to change its organization. The option to do that was given by Section 5 (i) of Home Owners' Loan Act of 1933, as amended. The power there conferred was ample. It endeavored to avoid the solution of these objections by stating that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, should "contain the clearest sort of language to warrant the contention asserted by" appellant association (257 N. W. 690). We contend that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, does now contain the clearest sort of language to warrant validity of conversion, to-wit, "any member of a Federal Home Loan Bank may convert itself into Federal Savings and Loan Association *under this Act.*" (Italics ours.)

Said highest court wholly ignored that such conversion by the express provisions of Section 5 (i) was to take place "under this Act."

As aforesaid, the Supreme Court of the State of Wisconsin had before it the decision in the case of *Casey* v. *Galli, supra,* in which the Supreme Court of the United States held.

(1) That no authority from a State was necessary to enable the State bank to convert itself into a national bank;

(2) That the Federal statute (Sec. 44 of the National Banking Act, 13 Stat. 112), conferred ample power;

(3) That the validity of such act could not be doubted;

(4) That the act was silent with respect to consent or permission on the part of the State. In that regard the court said:

> "It was as competent for Congress to authorize the transmutation as to create such institutions originally."

Such decision interpreting the National Banking Act, 13 Stat. 112, compelled the Supreme Court of the State of Wisconsin to recognize that the words "any bank • • • may • • • become a national association" had been interpreted by the Supreme Court of the United States as meaning a grant of right, power, privilege and immunity to convert without regard to State laws. In *Casey* v. *Galli, supra,* the Supreme Court of the United States had not required the additional condition that the law of the State of Louisiana be amended so as to authorize the bank to convert; it had not held that the Federal statute did no more than to afford consent applicable to corporations which had obtained power from State law to transmute.

In *Fox River Paper Co.* v. *Railroad Commission of Wisconsin* (274 U. S. 651), it was held that whether a State court, in basing its decision on non-Federal grounds, has thereby sought to evade a constitutional issue, is a question on which the litigant is entitled to invoke the judgment of the Supreme Court of the United States.

In *Leathe* v. *Thomas* (207 U. S. 93, 99), the Court stated:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be appar-

> ent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

Indeed, as was held in the cases of *Neilson* v. *Lagow* (53 U. S. (12 How.) 98); *Klinjer* v. *Missouri* (80 U. S. (13 Wall.) 257) and *Ward* v. *Love County* (253 U. S. 17), non-Federal grounds put forward by a highest State court, which are plainly untenable, will not preclude the Supreme Court of the United States from taking jurisdiction; it will be presumed that the State court based its judgment on the Federal grounds in question.

The Supreme Court of the State of Wisconsin attempted to avoid the force of the interpretation of language in the National Banking Act which is almost identical to the language under consideration in Section 5 (i) of the Home Owners' Loan Act by establishing a false distinction between banks on the one hand and building and loan associations on the other. It stated in its opinion, page 690:

> "Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to domestic corporations organized under State law * * *. This act constituted an unmistakable investiture of corporate power upon State banks."

It refused to recognize the power of Congress to invest State building and loan associations with such power on the grounds that:

> "They are not banks; they have not banking powers or privileges under our State law." (Page 686.)

It is apparent that the reason for the distinction made by the Supreme Court of the State of Wisconsin between banks and building and loan associations was that said court did not believe that Congress had power to invest State building and loan associations with corporate power to convert without regard to State laws as Congress had invested State banks with such power. It is therefore perfectly apparent that the effect of the decision and injunction of the Supreme Court of the State of Wisconsin is the invalidation of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. The Supreme Court of the State of Wisconsin has made it plain, therefore, on the face of its decision, that the reason for its decision and for its injunction is that said court does not believe that Congress had constitutional power to enact said Section 5 (i).

Although the court stated, at page 689:

> "Second, if it be found that it was the purpose of Congress by that act thus to increase respondent's corporate powers, then, has Congress the power to accomplish his result?
>
> "We are not treating specifically the second question for reasons pointedly set forth, * * *."

said court did not refrain from answering said second question but, in fact, based its decision and its injunction upon a negative answer to such question.

It therefore seems plain that the Supreme Court of the State of Wisconsin erred:

(1) In refusing the authority of *Casey* v. *Galli, supra,* as to the validity of the Federal statute providing for conversion;

(2) As to the clear and unmistakable meaning of almost identical statutory language authoritatively construed by

this Honorable Court as was clearly pointed out to it by appellant, and

(3) By its injunction, which, in fact, destroyed the legal result and the validity of a Federal statute.

WHEREFORE, appellant respectfully submits that appellees' Motion to Dismiss or Affirm the decision of the Supreme Court of the State of Wisconsin should be denied; that appellees' Statement in Opposition to Jurisdiction is without merit and should be disregarded; that this Honorable Court has jurisdiction to hear this appeal under Section 237 (a) of the Judicial Code (28 U. S. C. 344 (a)); and that this Honorable Court should hear appellant's appeal upon its merits. In any event, appellant submits that a substantial and important Federal question is presented that certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States, to-wit, Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, were denied, and further submit that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of Section 237 (b) and (c) of the Judicial Code (28 U. S. C. 344 (b), (c)).

Respectfully submitted,

EMERY J. WOODALL,
Attorney for Appellant.

JOHN H. SCHLINTZ,
LYMAN W. SHERWOOD,
By EMERY J. WOODALL,
Of Counsel.

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OCT 1 1935

Supreme Court of the United States

OCTOBER TERM, 1935

No. 55

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION OF MILWAUKEE, ET AL., *Petitioners,*

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN,

No. 56

RELIANCE BUILDING AND LOAN ASSOCIATION, A CORPORATION, *Petitioner,*

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.,

No. 57

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION, *Petitioner,*

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRITS OF CETIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF PETITIONERS

HORACE RUSSELL,
EMERY J. WOODALL,
Attorneys for Petitioners.

LYMAN W. SHERWOOD,
JOHN H. SCHLINTZ,
B. F. SALTZSTEIN,
E. J. GROSS,
WALLACE REISS,
J. ALDRICH HALL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 55

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION OF MILWAUKEE, ET AL.

Petitioners,

v.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN,

Respondents,

No. 56

RELIANCE BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Petitioner,

v.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, and CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Respondents,

No. 57

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Petitioner,

v.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Respondents.

BRIEF ON BEHALF OF THE PETITIONERS*

The attorneys appearing for Petitioners are Horace Russell and Emery J. Woodall. Horace Russell is General Counsel for the Federal Home Loan Bank Board, the Home

* This brief is respectfully submitted in behalf of all of the Petitioners in the three causes, Nos. 55, 56, 57.

Owners' Loan Corporation and the Federal Savings and Loan Insurance Corporation. Emery J. Woodall is Associate General Counsel for the Federal Savings and Loan Insurance Corporation. At the request of Petitioners, in view of the importance of the decision of these causes to the national home financing system provided by the Congress in the statutes involved in these causes, Messrs. Russell and Woodall have accepted, without fee, appointment as attorneys for Petitioners and so appear before this Court.

OFFICIAL REPORT

The opinion of the Supreme Court of the State of Wisconsin in the three causes consolidated below is reported in 257 N. W. 684. The official report of the State of Wisconsin has not yet been issued.

The Question

These causes present the broad question of the power of Congress to incorporate private moneyed corporations organized under State laws into the fiscal system of the United States. Congress has previously exercised such power in incorporating State banks into the national fiscal system. Whether in Section 5 of the Home Owners' Loan Act of 1933 Congress exercised such power is in question.

Petitioners will urge that Congress has supreme and exclusive power over the national fiscal system and has validly exercised such power in the statutes under review.

Cases regarding the power of Congress to create and control fiscal agencies, decided by this Court down through the history of the United States, hold that Congress has exclusive power to create fiscal agents, including corporations. Witness the First and Second Banks of the United States, the system of National Banking Associations, the Federal Reserve Banks, the Federal Farm Loan System, all of which were chartered under Federal law. Congress has more recently created the Federal Home Loan Banks, Federal savings and loan associations, the Reconstruction Finance Corporation, the Home Owners' Loan Corporation and numerous other Federal corporations to act as fiscal agents of the Government. Congress also has power to adopt existing State corporations for fiscal purposes and to transmute them into Federal corporations. This has been done during the past 70 years in the conversion of State banks into National banks.

Federal savings and loan associations which Congress has authorized to be incorporated as Federal corporations have been created as fiscal agents and as members of the Federal Home Loan Banks and thus as constituent parts of the national fiscal system. They are created to serve fiscal needs of the United States and are adapted to that service. Similar corporations chartered under State laws were available to be adopted by Congress to serve the fiscal needs of the government and to be converted into Federal corporations. Congress has validly provided for the conversion into Federal savings and loan associations of those State-chartered thrift and home financing institutions which desire to become a part of the national fiscal system under Federal charter.

ANALYSIS OF SECTION 5 OF HOME OWNERS' LOAN ACT OF 1933

Section 5 of Home Owners' Loan Act of 1933 is printed as Appendix A to this brief.

The entire Act, as amended by an Act to guarantee the bonds of the Home Owners' Loan Corporation, approved April 27, 1934, is printed with an index in the Transcript of Record, Cause No. 55, beginning on page 16.* Section 5 relating to Federal savings and loan associations begins on page 27 of such transcript. Section 5(i) is found on page 29.

Briefly, Section 5 provides:

1. The Federal Home Loan Board (hereinafter referred to as the Board) is authorized under rules and regulations prescribed by it:

(*a*) To issue charters to local mutual thrift institutions to be known as Federal savings and loan associations, in which people may invest their funds and in order to provide for the financing of homes. The Board is required to give primary consideration to the best practices of local

* The Court's attention is called to the fact that the Act has been further amended by Public—No. 76—74th Congress, being an Act to provide additional home-mortgage relief, to amend the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933 and the National Housing Act, and for other purposes, approved May 28, 1935. The fund created by Congress in Section 6 to enable the Board to encourage local thrift and home financing and to promote, organize and develop Federal savings and loan associations or similar associations organized under local laws was increased from $500,000 to $700,000 by such Act.

mutual thrift and home financing institutions in the United States in issuing such charters (Section 5(a)).

(*b*) To re-organize, consolidate, merge or liquidate such Federal associations; to appoint conservators or receivers therefor or to require equitable re-adjustment of the capital structure thereof (Section 5(d)).

(*c*) To issue charters to State institutions which are members of a Federal home loan bank upon the exercise by such institutions of the right and power to convert conferred by Section 5(i).

(*d*) To make rules and regulations for the incorporation, examination and operation of Federal savings and loan associations (Sections 5(a) and 5(b)).

2. The Board is permitted to issue charters, upon the finding of the following facts:

(*a*) Persons to whom charters are issued shall be of good character and responsibility.

(*b*) A necessity exists for such institution in the community to be served.

(*c*) There is reasonable probability of its usefulness and success.

(*d*) Such institution can be established without undue injury to properly conducted existing local thrift and home financing institutions (Section 5(e)).

3. Any member of a Federal home loan bank may convert itself into a Federal savings and loan association upon a prescribed vote at a legal meeting subject to rules and regulations of the Board (Section 5(i)).

4. The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred and full-paid income shares of any Federal savings and loan association on the terms and conditions of Sections 5(g) and 5(j).

5. Any Federal savings and loan association may be employed as fiscal agent of the Government when designated as such by the Secretary of the Treasury, and shall perform all such reasonable duties as fiscal agent as may be required of it. Any such association may act as agent for any other instrumentality of the United States when so designated by such instrumentality (Section 5(k)).

6. Federal savings and loan associations are granted exemption from all taxation now or hereafter imposed by the

United States. Their shares are exempt both as to value and the income therefrom from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or any other taxing authority. Such associations are also exempt from any tax imposed by any State, Territorial, county, municipal or local taxing authority greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions (Section 5(h)).

7. Any Federal savings and loan association may invest any portion of its assets in obligations of the United States or in stock or bonds of a Federal home loan bank (Section 5(c)).

8. Federal savings and loan associations shall raise their capital only in the form of payment on such shares as are authorized in their charters, which shares may be retired as is therein provided. No deposits shall be accepted (Section 5(b)).

9. Federal savings and loan associations shall lend their funds on the security of their shares, on the security of first liens upon homes or combination home and business property and other property upon limitations prescribed in Section 5(c).

10. Each Federal savings and loan association, upon its incorporation, shall be a member of the Federal home loan bank of the district in which it is located (Section 5(f)) upon qualification therefor as provided in the Federal Home Loan Bank Act, which Act is printed in full for the convenience of the Court as Appendix B to this brief.

ANALYSIS OF FEDERAL HOME LOAN BANK ACT

The Federal Home Loan Board consists of five citizens of the United States, appointed by the President by and with the advice and consent of the Senate. The Board, pursuant to Sections 3 and 17, has divided the United States into twelve bank districts and established a Federal home loan bank in each district.

Thrift and home financing institutions organized under the laws of any State or of the United States, which are subject to inspection or regulation under such laws, and which make long term home mortgage loans, are eligible

to become members of a Federal home loan bank. Membership is effected by the purchase of stock of a Federal home loan bank (Sections 4 and 5).

The Secretary of the Treasury is directed to subscribe on behalf of the United States for part of the capital of each bank (Section 6). A total sum of $124,741,000 was set aside by the Secretary of the Treasury for subscriptions to such stock. As of June 30, 1935, the Secretary of the Treasury had purchased stock in the twelve Federal Home Loan Banks totaling $81,645,700 par value.

The management of each bank is vested in a Board of twelve Directors (Section 7).

Each bank is authorized to make advances to member institutions upon the security of home mortgages or obligations of the United States or obligations fully guaranteed by the United States, subject to regulations prescribed by the Federal Home Loan Bank Board.

Briefly, the principal powers of Federal home loan banks are:

(*a*) Usual corporate powers (Section 12).

(*b*) Power to borrow money and give security therefor and issue evidences thereof, including debentures, bonds and other obligations (This power has not been exercised).

(*c*) The Federal Home Loan Bank Board may issue consolidated Federal home loan bank debentures which shall be the joint and several obligations of all Federal home loan banks, subject to certain restrictions specified in the statute (This power has not been exercised).

(*d*) Power to accept deposits made by member institutions, other Federal home loan banks or other instrumentalities of the United States. Any bank may rediscount the discounted notes of members held by other Federal home loan banks or make loans to or deposits with other Federal home loan banks, or purchase any bonds or debentures issued pursuant to the Act.

(*e*) Power to invest in obligations of the United States and securities in which trust funds may be invested under the laws of the State in which the bank is located, and to make deposits in banks or trust companies (Section 11).

When designated by the Secretary of the Treasury, each bank shall be a depositary of public money (except receipts from customs) and may be employed as a financial agent of the government and perform all such reasonable duties as may be required of it (Section 14).

STATEMENT OF FACTS

The essential facts in these three causes are:

Each Petitioner association was a corporation organized under the laws of the State of Wisconsin. Each Petitioner association now is, and, at the time petition for conversion was made, was a member of the Federal Home Loan Bank of Chicago (R. Cause No. 55, p. 45; Cause No. 56, p. 16; Cause No. 57, p. 16). Each Petitioner association applied to the Federal Home Loan Bank Board, in compliance with rules and regulations prescribed by it, for permission to convert under Section 5(i) of the Home Owners' Loan Act of 1933. Said Board granted said petitions (R. Cause No. 55, p. 13; Cause No. 56, p. 23; Cause No. 57, p. 23). Each Petitioner association thereupon in the exercise of the right and power conferred by Section 5(i) convened legal meetings to consider conversion. At each of such meetings a vote of more than 51 per centum of the votes cast was in favor of conversion (R. Cause No. 55, p. 48; Cause No. 56, p. 32; Cause No. 57, p. 33). Each Petitioner association thereupon requested the Federal Home Loan Bank Board to issue a Federal charter to it. Said Board issued a charter to Petitioner association in Cause No. 55 under the name of "Hopkins Federal Savings and Loan Association of Milwaukee" (R. Cause No. 55, p. 13). In Causes Nos. 56 and 57, charters have not as yet been issued by the Federal Home Loan Bank Board to Petitioners therein.

Cause No. 55

Respondents filed a petition for leave to commence an original action in the Supreme Court of Wisconsin on September 13, 1934, for a judgment declaring the conversion by Hopkins Street Building and Loan Association into Hopkins Federal Savings and Loan Association of Milwaukee to be null, void and of no effect; declaring said association to be under the jurisdiction of the Banking Commission of

Wisconsin; compelling the officers and directors of said association to operate it as a Wisconsin building and loan association or to wind up its affairs as provided by the statutes of the State of Wisconsin; and restraining and enjoining said association and its officers and directors from operating as a Federal savings and loan association (R. pp. 11-16).

CAUSE No. 56

Reliance Building and Loan Association, Petitioner in Cause No. 56, filed its complaint in the Circuit Court of Milwaukee County, State of Wisconsin, on or about July 21, 1934, for a judgment against Respondents enjoining and restraining them from taking possession of and interfering with the conduct and management of Petitioner and from interfering with any meetings of said association called for the purpose of considering, determining and voting upon the proposed conversion of said association into a Federal savings and loan association (R. pp. 15-20). Judgment was entered on the 12th day of September, 1934, in said Circuit Court that Petitioner had the right and power to convert into a Federal savings and loan association and that the Acts of Congress so providing are valid and constitutional; that Respondents had no right or authority to take possession of Petitioner to prevent such conversion; and that Respondents were restrained and enjoined from taking possession of Petitioner or interfering with such proposed conversion (R. p. 43).

CAUSE No. 57

Northern Building and Loan Association, Petitioner in Cause No. 57, filed its complaint in said Circuit Court on or about July 31, 1934, for a judgment against Respondents enjoining and restraining them from taking possession of and interfering with the conduct and management of Petitioner and from interfering with any meetings of said association called for the purpose of considering, determining and voting upon the proposed conversion of said association into a Federal savings and loan association (R. pp. 15-20). Judgment was entered on the 12th day of September, 1934, in said Circuit Court that Petitioner had the right and

power to convert into a Federal savings and loan association and that the Acts of Congress so providing are valid and constitutional; that Respondents had no right or authority to take possession of Petitioner to prevent such conversion; that Respondents were restrained and enjoined from taking possession of Petitioner or interfering with such proposed conversion (R. p. 44).

Respondents thereupon appealed from the judgment of said Circuit Court in Causes Nos. 56 and 57 (which had been consolidated in said Circuit Court) to the Supreme Court of the State of Wisconsin (R. Cause No. 56, p. 44; Cause No. 57, p. 45), assigning as error the failure of said Circuit Court to find:

"1. That Congress has no power to incorporate Federal savings and loan associations;

"2. Assuming that it has such power, that Congress improperly delegated this power to the Federal Home Loan Bank Board;

"3. That the language of Section 5(i) of the Home Owners' Loan Act of 1933, as amended, implies necessity of State consent to the propdsed conversion of a State building and loan association into a Federal savings and loan association; and

"4. That Congress has no power to authorize the conversion of State building and loan associations into Federal savings and loan associations without the consent of the State" (Statement as to Jurisdiction, Causes Nos. 56 and 57, pp. 18).

The Three Causes

The three causes herein were consolidated in the Supreme Court of the State of Wisconsin.

The judgment in the Supreme Court of the State of Wisconsin enjoined Hopkins Federal Savings and Loan Association of Milwaukee from operating as a Federal savings and loan association and commanded Petitioners in Cause No. 55 to operate as a Wisconsin building and loan association (R. p. 67). The judgments in Causes Nos. 56 and 57, affirmed by the Supreme Court of the State of Wisconsin on May 1, 1935, (R. Cause No. 56, p. 68; Cause No. 57, p. 69) enjoined Reliance Building and Loan Association and Northern Building and Loan Association from taking any further steps in connection with conversion (R. Cause No. 56, p. 65; Cause No. 57, p. 66).

The decision below held that Petitioners in the three causes herein had no power to divest themselves of the corporate charter derived from the State of Wisconsin and accept a Federal charter by converting pursuant to Section 5(i) of Home Owners' Loan Act of 1933; that said Act of Congress did not attempt to invest said State corporations with any power not granted to them by the State of Wisconsin but did no more than to afford consent to any State corporations which had derived power to convert from the State sovereign (R. Cause No. 55, p. 61); that said Act of Congress should be so construed in order to avoid a number of serious constitutional objections, to-wit:

(*a*) That since the State of Wisconsin, by power reserved in its constitution, has retained control over corporations under its laws, and since the State undoubtedly has plenary powers both of organization and control, prior to this Act, it cannot be ousted by any Act of Congress from these powers (R. Cause No. 55, p. 63).

(*b*) That the change in the corporate charter permitting conversion upon a vote of 51 per cent of the stockholders would be an impairment of the contract rights of the State and the stockholders of a Wisconsin corporation (R. Cause No. 55, p. 63).

(*c*) That it would divest stockholders of their rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States (R. Cause No. 55, p. 61).

Petitioners in these causes respectfully petitioned the Chief Justice of the Supreme Court of the State of Wisconsin for the allowance of appeals to this Court (R. Cause No. 55, p. 1; Cause No. 56, p. 1; Cause No. 57, p. 1). The Chief Justice allowed such appeals (R. Cause No. 55, p. 5; Cause No. 56, p, 6; Cause No. 57, p. 5). This Court on June 3, 1934, dismissed the appeals herein on motions of Respondents for want of jurisdiction and treated such appeal papers as applications for Writs of Certiorari, which were granted (R. Cause No. 55, p. 71; Cause No. 56, p. 69; Cause No. 57, p. 70).

Each Petitioner specially set up and claimed under Section 5 the right, privilege and power to convert into a Fed-

eral savings and loan association. The Court below, by its decision, denied such right, privilege and power to convert and restrained and enjoined the same. Each Petitioner set up and claimed under Section 5 immunity from compliance with the requirements of the laws of the State of Wisconsin in connection with such conversion. The decision of the Court below denied such immunity and commanded Petitioners' continued compliance with the laws of Wisconsin and subjection to the jurisdiction of the Banking Commission of the State of Wisconsin.

CONSTITUTIONALITY

The Court may deem it proper and necessary to determine the constitutionality of the statutes involved in these causes. In the exercise of its discretion, it may proceed to such determination of constitutionality because of the following facts:

1. The Court may not desire to construe Section 5(i) of the Home Owners' Loan Act of 1933 without first determining whether such enactment of Congress is a valid statute.

2. Validity of the statutes are at issue in the pleadings (R. Cause No. 55, pp. 13, 45; R. Cause No. 56, pp. 23, 28; R. Cause No. 57, pp. 25, 28).

3. Upon reversal of the Court below a final determination of these causes cannot be reached without a determination of the validity of the statutes involved. Upon such remand to the Court below the injunction can be made permanent only upon the holding that a Federal statute is invalid. The injunction can be dissolved only upon a holding that the Federal statutes are valid.

4. The Court below clearly indicated that if Section 5(i) be interpreted as Petitioners contend, to-wit, that it increased the corporate powers of such State corporations by an investiture of the right and power of converting and created an immunity from control by the State of Wisconsin and its Banking Commission and did not operate merely as consent to conversion so far as the Federal Government is concerned, it would hold such section invalid under the Constitution of the United States. Upon reversal and remand, it is, therefore, indicated that the Court below would, under such controlling interpretation, declare the Act unconstitutional. It would then be necessary for Petitioners herein to renew their appeals to this Court for a review of the constitutional questions involved.

5. The Court below used the following language relative to validity:

"If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will be permitted, so far as the Federal Government is concerned, without purporting to increase corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin, by power reserved in its constitution, has retained control over corporations organized under its laws, and since the state undoubtedly had plenary powers, both of organization and control, prior to this act, it cannot be ousted by any act of Congress from these powers; that since a building and loan association is not a banking institution, the case of *Casey* v. *Galli, supra,* has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders would be an impairment of the contract rights of stockholders in a Wisconsin corporation. That these are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find (R. Cause No. 55, p. 63). • • •

"Since respondents' charters do not provide for transmutation and no authority emanating from the State of Wisconsin accords them the privilege, or attempts to confer corporate power upon them to transmute, two questions are suggested. First, has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation? Second, if it be found that it was the purpose of Congress by that act thus to increase respondents' corporate pow-

ers, then, has Congress the power to accomplish this result? (R. Cause No. 55, p. 60). • • •

"As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. Nor would a State statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal Government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things: first, it would enable a building and loan association to escape from regulatory control reserved by the State, and second, it would divest stockholders of their rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate character is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation (R. Cause No. 55, p. 61). • • •

"Any method under which a State association seeks to transfer itself into a Federal group without consideration of the contractual relation existing between it and the State would seem to be ineffective. It has only the powers emanating from the State and these must be used as prescribed by the State with due consideration for the contractual rights between stockholders and the association existing by reason of State laws and the charter of the corporation. • • •

"Our attention is called to *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168, and particular emphasis is placed on the statement in the opinion: 'It was as competent for Congress to authorize the transmutation as to create such institutions originally' (R. Cause No. 55, p. 62). • • •

"We cannot recognize the result in that case as determining that the Federal Government may invade the jurisdiction of the State government and appropriate for its own purposes the agencies devised by the State for the welfare of its citizens or interfere against the wish of the State with respect to contracts existing between the State and corporations of its own creation. Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to other domestic corporations organized under State law for the State's purposes in providing for the welfare of its citizens (R. Cause No. 55, p. 62). • • •

"The cause was first submitted upon arguments and *briefs dealing to a large extent with the questions of* whether Congress has power to incorporate Federal savings and loan associations and as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute themselves into Federal savings and loan associations. We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the State of power over corporate charters. Since then we have again examined the questions raised. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a savings and loan association under the Federal act. • • •

"Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign State by accepting a charter from any other sovereign government" (R. Cause No. 55, pp. 54, 55).

6. This Court, as far back as 1873, in the case of *Murdock v. Memphis,* 87 U. S. (20 Wall.) 590, indicated that it was within its jurisdiction, in a proper case, which Petitioners believe this to be, to render such judgment as should have been rendered by the Court below. The Court, in that case, speaking through Mr. Justice Miller, said:

"But, if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that court, as the circumstances of the case may require" (p. 636).

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED

In Cause No. 55 Petitioners rely upon assigned errors Nos. 1, 3 and 5 (R., p. 7) to-wit:

"1. The Supreme Court of the State of Wisconsin under the law and evidence in this cause erred

(*a*) In determining

(i) That the conversion by appellant association into a Federal savings and loan association was null, void and of no effect,

(ii) That appellant association was still a Wisconsin building and loan association, and

(iii) That appellant association was sti.. subject to the jurisdiction of the Wisconsin Banking Commission;

(*b*) In commanding appellants to operate appellant association as a Wisconsin building and loan associa-

tion under the direction and jurisdiction of Wisconsin Banking Commission; and

(*c*) In restraining and enjoining appellants from operating appellant association as a Federal savings and loan association.

"3. The Supreme Court of the State of Wisconsin erred

(*a*) In refusing in its decision to recognize and give effect to an Act of Congress validly enacted in the execution of the powers vested in the Federal Congress by the Constitution of the United States of America, to-wit, Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended;

(*b*) By its writ of injunction, in retarding, impeding, burdening and controlling the operations of said Act of Congress; and

(*c*) In denying titles, rights, privileges and immunities of appellants specially set up and claimed by appellants under said Act of Congress.

"5. The Supreme Court of the State of Wisconsin erred in holding that paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646), merely permitted Wisconsin associations to convert only if and when the legislature of the State of Wisconsin enacted legislation consenting to such conversion, but did not empower conversion of appellant association without legislation of the State of Wisconsin consenting to such conversion."

In Causes Nos. 56 and 57, Petitioners rely upon assigned errors Nos. 1, 2, 3, 5 and 7 (R. pp. 7), to-wit:

"1. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of an order by the Circuit Court of Milwaukee County, restraining and enjoining appellant from converting into a Federal savings and loan association.

"2. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of the judgment by the Circuit Court of Milwaukee County, dismissing appellant's complaint upon its merits.

"3. The Supreme Court of the State of Wisconsin erred in directing and affirming the entry of a judgment declaring that appellees have full power and authority to take

possession of appellant association under the laws of the State of Wisconsin.

"5. The Supreme Court of the State of Wisconsin erred

(*a*) In refusing in its decision to recognize and give effect to an Act of Congress validly enacted in the execution of the powers vested in the Federal Congress by the Constitution of the United States of America, to-wit; Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended.

(*b*) In retarding, impeding, burdening and controlling the operations of said Act of Congress; and

(*c*) In denying titles, rights, privileges and immunities of appellant specially set up and claimed by appellant under said Act of Congress.

"7. The Supreme Court of the State of Wisconsin erred in holding that paragraph (i) of Section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 134), as amended by Act of Congress approved April 27, 1934 (48 Stat. 643, 646), merely permitted Wisconsin associations to convert only if and when the legislature of the State of Wisconsin enacted legislation consenting to such conversion, but did not empower conversion of appellant without legislation of the State of Wisconsin consenting to such conversion."

SUMMARY OF ARGUMENT

We submit that:

I. Section 5(i) of Home Owners' Loan Act of 1933 is an absolute grant of right and power to any member of a Federal home loan bank to convert itself into a Federal savings and loan association. It is not merely the grant of permission if such member has right and power under State law.

1. The Act contains the clearest sort of language granting such right and power to convert.

2. Congress amended this Act in order to make certain the grant of right and power to convert under this Act.

3. Congress refused or failed to require that conversion shall not contravene State laws.

4. Similar Federal conversion statutes have been so interpreted by this Court and by the Court below in these causes.

II. Congress had power to use the public moneys, and to provide for the borrowing of money to aid in home financing throughout the country in accordance with a systematic and general plan to promote thrift and home financing, involving the application of money through loans. Congress, having this power, could exercise it by the adoption of appropriate means to that end and the creation of instrumentalities for that purpose.

1. Congress had power directly to use the public moneys for the purpose of promoting thrift and home financing. Congress was not, however, limited to the use of public moneys by outright appropriations, but, having that authority, could create a revolving fund to be used through loans. Instead of an outright appropriation of public moneys to promote thrift and home financing, Congress chose to create corporate instrumentalities and to appropriate funds to be used as revolving capital funds of Federal Home Loan Banks and Federal savings and loan associations. The purpose thus subserved, through the provisions of the Act, was a public purpose and for the general welfare.

2. Promotion of thrift and home financing is in the general welfare of the nation.

3. Having this power with respect to the use of public moneys for the general welfare, Congress could exercise such power by the adoption of appropriate means to that end and the creation of instrumentalities for that purpose.

III. Congress has power to create any fiscal agencies which it deems necessary and proper to the operations of the Federal Government. Its decision in such matters is not open to judicial review. Congress may create by original incorporation and by conversion of State institutions, as in this instance, moneyed institutions to serve as fiscal agents of the Government and to provide a market for United States bonds.

1. The twelve Federal home loan banks constituting the Federal Home Loan Bank System are banking instrumentalities lawfully created for facilitating the fiscal operations of the Government. They are designed to promote home financing and to relieve the other financial institutions in the national fiscal system from the demands of long term home financing credits.

2. Federal savings and loan associations are lawfully created fiscal agencies of the United States in that:

(a) They are fiscal agencies for the application of public moneys for a public purpose and for the general welfare;

(b) They are fiscal agencies through which the Government supplies financial aid, through loans on a general plan, which it is competent for the Government directly to supply and to organize corporate instrumentalities to supply;

(c) They are constituted fiscal agencies of the Government and are bound to perform all reasonable duties imposed upon them as such agents; and

(d) They aid in the exercise of the borrowing power of the Government by the provisions for investment and dealing in United States Bonds.

3. Each of the purposes above enumerated would alone be sufficient to sustain the Act. From their inception to their winding up, Federal saving and loan associations are, as above shown, financial institutions constituting Federal instrumentalities whose main purpose is to perform governmental functions. Congress is the sole judge of the need for these instrumentalities; Congress has measured that need in creating such instrumentalities.

4. Federal savings and loan associations are banking instrumentalities to provide home mortgage credit.

5. The Federal Home Loan Bank System and the Federal Savings and Loan System constitute further steps in the development by Congress of the national fiscal system.

IV. There was no delegation of legislative authority by Congress in authorizing the Federal Home Loan Bank Board to make rules and regulations providing for the organization, incorporation, examination, operation, conversion, reorganization, consolidation, merger or liquidation of Federal savings and loan associations.

1. The Board's power to issue charters is an administrative act in the execution of Congressional policy upon its finding of certain facts.

2. The Board's power to regulate the conversion of State institutions into Federal savings and loan associ-

ations is an administrative act in the execution of Congressional policy upon its finding of certain facts.

(a) The word "conversion" is a word of art which has expressed for more than 70 years a legislative policy both as to legal effect and legal procedure.

(b) The essential legal means of exercising the right and power to convert are specified in the statute.

3. The words "re-organize, consolidate, merge or liquidate" relating to Federal financial institutions are words of art which have expressed for many years a legislative policy both as to legal effect and legal procedure.

4. The Board's power to make rules and regulations is administrative in character. The exercise of such power consists merely of prescribing the detailed means of compliance with legislative policy expressed in the statute in order to supply the minutiae which compose the primary standards fixed by Congress and the detailed procedural steps for the accomplishment of the legislative objectives fixed by the statute.

V. The conversion of a member of a Federal home loan bank into a Federal savings and loan association does not deprive either the State which incorporated such institution or any of the stockholders of such institution of property or contract rights without due process of law.

I.

SECTION 5 (i) OF HOME OWNERS' LOAN ACT OF 1933 IS AN ABSOLUTE GRANT OF RIGHT AND POWER TO ANY MEMBER OF A FEDERAL HOME LOAN BANK TO CONVERT ITSELF INTO A FEDERAL SAVINGS AND LOAN ASSOCIATION. IT IS NOT MERELY THE GRANT OF PERMISSION IF SUCH MEMBER HAS RIGHT AND POWER UNDER STATE LAW.

1. The Act Contains the Clearest Sort of Language Granting Such Right and Power to Convert.

Section 5(i) reads as follows:

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more

of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

The words: "Any member • • • may convert itself into a Federal Savings and Loan Association under this Act • • •" clearly indicate that the member need look only to "this Act" for right and power to convert. The words "upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action"; prescribe the statutory method of exercising the legal right and power granted. The only other condition to the exercise of such right and power by such a member is compliance with the rules and regulations prescribed by the Federal Home Loan Bank Board. The only implication relating to State law arises from the words "votes cast at a legal meeting called to consider such action." Such meeting must be legally convened in accordance with the institution's charter and by-laws and State statutes. The number of votes required for the exercise of such right and power is expressly determined by "this Act," to-wit, 51 per cent or more. This condition was fulfilled (*supra*, p. 7).

The legal result of the exercise of such right and power by such vote is prescribed by this Act, to-wit: The converted association shall be entitled to all the benefits of Section 5 of this Act, including exemption from Federal and local taxation, as prescribed in Section 5(h); the right to have the Secretary of the Treasury subscribe for its preferred and full-paid income shares, as provided in Sections 5(g) and 5(j); the status of a Federal instrumentality, as provided in Section 5(k); the right to insurance of the accounts of its shareholders by the Federal Savings and Loan Insurance Corporation (Section 403 (a) of the National Housing Act, 12 U. S. C., Supp. 1726). It becomes subjected to examination and regulation by the Federal Home Loan Bank Board. It is no longer subject to examination or regulation by any State authority. It has immunity from compliance with State laws and orders of State regulatory authorities.

The right and power to convert, the means of exercising such right and power, and the legal result of the exercise of such right and power, are fixed exclusively by this Act, except solely as to the assembly of the legal meeting called to consider conversion.

2. Congress Amended this Act in Order to Make Certain the Grant of Right and Power to Convert Under this Act.

Prior to the Act of Congress approved April 27, 1934 (48 Stat. 643, 646), the means of exercising the right and power was not determined by this Act. Section 5(i) as originally enacted (48 Stat. 134) provided that the right and power be exercised by "a vote of its stockholders as provided by the law under which it operates." From June 13, 1933, until April 27, 1934, the right and power could not be exercised if the law of the State under which a member was organized failed expressly to authorize conversion. This Act, before it was amended by Section 6 of the Act of Congress approved April 27, 1934 (48 Stat. 646), was intended, in the words of the decision of the Court below, "to be administered in forty-eight States" (R. Cause No. 55, p. 61), and did prescribe a different means of exercising the right and power to convert by "corporations operating under different degrees of State control and with different powers" (ibid). It seems evident, however, that when Section 6 of the Act of Congress approved April 27, 1934 (48 Stat. 646), struck out the words "upon a vote of its stockholders as provided by the law under which it operates" and inserted in lieu thereof the words "upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action," Congress intended thereby to provide that any member could exercise the right and power to convert "under this Act" without regard to the vote required by State statute, upon obtaining a vote of 51 per cent or more of the votes cast at such legal meeting.

By such amendment Congress made certain the grant of right and power to convert without regard for State law, except as to the manner of calling "a legal meeting" of stockholders. The effect of such amendment of Section 5(i) by Congress is destroyed by the interpretation of the Court below, to-wit:

"It does no more than to afford consent applicable to corporations having the power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. * * * The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal Government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation" (R. Cause No. 55, p. 61).

3. Congress Refused or Failed to Require that Conversion Shall Not Contravene State Laws.

Congress had before it Section 44 of The National Bank Act, as originally enacted, June 3, 1864, as follows:

"Sec. 44. *And be it further enacted,* That any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a national association under its provisions, by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act."

It also had before it, the section as codified in June 22, 1874, in the Revised Statutes of the United States, which reads:

"Sec. 5154. Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and

the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association."

Forty-nine years later, by Act of Congress approved December 23, 1913 (38 Stat. 258), Congress amended such section of The National Bank Act so as to read as follows:

"Any bank incorporated by special law of any State or of the United States, or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency: *Provided, however,* That said conversion shall not be in contravention of the State law."

The chief change of substance was the *proviso* requiring that conversion of State banks shall not contravene State laws.

On March 4, 1923, Congress provided for the conversion of State-chartered agricultural or livestock financing corporations into National Agricultural Credit Corporations, as follows:

"Sec. 1281. *Conversion of State agricultural or livestock financing corporations into National Agricultural Credit Corporations.* Any agricultural or livestock financing corporation incorporated by special laws of any State or organized under the general laws of any State and having an unimpaired capital sufficient to entitle it to become a National Agricultural Credit Corporation may, by the vote of the shareholders owning not less than 51 per centum of the capital stock of such corporation, with the approval of the Comptroller of the Currency, be converted into a National Agricultural Credit Corporation under this chapter, with any name approved by the

Comptroller of the Currency: *Provided*, That the said conversion shall not be in contravention of the State law" (Title 12, U. S. C.).

Congress did not see fit, however, to write into Section 5(i), either as originally enacted in 1933 or when it was amended in 1934, such *proviso* that: "said conversion shall not be in contravention of the State law." But the interpretation by the Court below that it is merely the grant of permission if such member has right and power under State law, amounts to writing into this Act such *proviso*, which Congress refused or failed to enact. The Court below exceeded its authority by such judicial legislation inserting such *proviso*, and should, we submit, be reversed.

4. Similar Federal Conversion Statutes Have Been So Interpreted by this Court and by the Court Below in these Causes.

Under Section 44 of The National Bank Act, as originally enacted, the Bank of New Orleans, a banking corporation organized under the laws of the State of Louisiana, converted itself into a National bank, and this conversion was recognized as valid in 1877 by the Supreme Court in *Casey* v. *Galli* (94 U. S. 673). At page 678 the Court, by Mr. Justice Swayne, said:

"No authority from the State was necessary to enable the Bank so to change its organization. The option to do that was given by the 44th section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

Referring to that statute, the Court below said:

"A majority of the directors are thereafter specifically given the power to execute all necessary papers essential to a perfection of the organization as a national association. This act constituted an unmistakable investiture of corporate powers upon State banks" (R. Cause No. 55, p. 63).

Although the Court below stated that Section 44 of the National Bank Act "constituted an unmistakable investiture of corporate powers upon State banks," it held that almost identical empowering words in this Act *did not* constitute an investiture of corporate powers upon Petitioners. In spite of the evident equivalent force of the word "may" in both Acts, the Court below stated with regard to Section 5(i) as follows:

> "The Act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find" (R. Cause No. 55, p. 64).

It is respectfully submitted that the words "any member * * * may convert itself * * * under this Act" found in Section 5(i) are as clear as the empowering words "any bank * * * may become a national association under this Title * * *" found in The National Bank Act, as codified in 1874.

The Court below explained why "the clearest sort of language" in Section 5(i) granting the right and power of conversion is not accepted as a grant of the right and power to convert. Such explanation is found in the following words referring to The National Bank Act:

> "That Act authorized State banks to become National banks" (R. 55, p. 63).

The Court below discussed *Casey* v. *Galli, supra,* and said:

> "Since a building and loan association is not a banking institution, the case of *Casey* v. *Galli, supra,* has no application" (R. Cause No. 55, p. 63).
>
> "Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to other domestic corporations organized under State law for the State's purposes in providing for the welfare of its citizens" (R. Cause No. 55, p. 62).

The Court below, by its own explanation, accepted the power of Congress to transmute banking corporations but "questioned whether it has power with respect to other domestic corporations," to-wit: the power to transmute building and loan associations.

In *M'Culloch* v. *Maryland,* 4 Wheat. 316, at page 407,

et seq., Chief Justice Marshall enumerated the powers of Congress under the Constitution with respect to banks and corporations, as follows:

"Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. * * * It may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. * * * Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. * * * But it is denied that the Government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. * * * The creation of a corporation, it is said, appertains to sovereignty. * * * In America, the powers of sovereignty are divided between the Government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. * * * The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of ex-

ecuting them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. * * * The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them. But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the Government of the United States, or in any department thereof' " (Article I, Sec. 8, Cl. 18).

This review of earlier Federal statutes admitted by the Court below as constituting an unmistakable investiture of corporate powers, and this explanation by the Court below in its own words of the reasons why it refused to interpret the empowering words of this Act as constituting an investiture of corporate power upon Petitioners, both compel, we submit, the holding that this Act is an absolute grant of the right and power of any member of a Federal home loan bank to convert itself into a Federal savings and loan association.

SUMMARY

Congress by this Act granted to any member the right and power to convert by complying with this Act alone. Congress amended this section as originally enacted to assure such grant of right and power. Respondents admit that Petitioners have complied with this Act:

(*a*) By obtaining the legal vote required by the Act, and

(*b*) By complying with the rules and regulations of the Federal Home Loan Bank Board promulgated pursuant to the Act.

Congress intended that Petitioners should obtain the legal result prescribed by this Act, including a Federal charter and all of the benefits accruing to all Federal savings and loan associations.

The Court below, therefore, erred as follows:

1. In holding:

(*a*) That Congress intended by this Act merely to permit Petitioners to convert only if and when the legislature of the State of Wisconsin enacted legislation consenting to such conversion; and

(*b*) That this section did not empower the conversion of your Petitioners.

2. In refusing to follow the rule of *Casey* v. *Galli, supra,* and the admittedly authoritative interpretation by this Court of almost identical language in the conversion section of The National Bank Act.

3. In determining that the conversion of Hopkins Federal Savings and Loan Association of Milwaukee was null, void and of no effect.

4. In restraining and enjoining Hopkins Federal Savings and Loan Association of Milwaukee from operating as a Federal savings and loan association and your other Petitioners from converting into Federal savings and loan associations; and in commanding them to operate as Wisconsin building and loan associations under the jurisdiction of the Wisconsin Banking Commission, thus retarding, impeding, burdening and controlling the operations of this Act of Congress; refusing to recognize and give effect to this Act of Congress; and denying titles, rights, privileges and immunities of Petitioners specially set up and claimed under this Act of Congress, to-wit, the right and power to convert and the resultant immunity from State control.

II.

CONGRESS HAD POWER TO USE THE PUBLIC MONEYS, AND TO PROVIDE FOR THE BORROWING OF MONEY TO AID IN HOME FINANCING THROUGHOUT THE COUNTRY IN ACCORDANCE WITH A SYSTEMATIC AND GENERAL PLAN TO PROMOTE THRIFT AND HOME FINANCING, INVOLVING THE APPLICATION OF MONEY THROUGH LOANS. CONGRESS, HAVING THIS POWER, COULD EXERCISE IT BY THE ADOPTION OF APPROPRIATE MEANS TO THAT END AND THE CREATION OF INSTRUMENTALITIES FOR THAT PURPOSE.

The power of Congress to create Federal savings and loan associations is implicit in and resultant from several

of the express powers of Congress enumerated in the Constitution as authoritatively construed by this Court. We enumerate briefly such express powers of Congress, to-wit:

(1) The power to tax,
(2) The power to borrow,
(3) The power to make all laws necessary and proper in executing the foregoing powers.

(1) *The power to tax.* Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States (Constitution U. S. Art I, Sec. 8, Cl. 1). The clause:

"provide for the common defense and general welfare of the United States"

has been construed as a qualification or limitation upon the taxing power rather than as creating an independent power of Congress. Such qualification upon the taxing power operates by prescribing that the purposes of appropriation of moneys obtained from taxation shall be objects which concern the common defense and general welfare of the United States.

Hamilton's Report on Manufactures, December 5, 1791, 3 Hamilton's Works (John C. Hamilton) 192.
Hamilton's Opinion on the Bank of the United States, February 23, 1791, 4 ibid. 104.
Jefferson's Opinion on the Bank of the United States, February 15, 1791, 5 Writings, Thomas Jefferson (Ford), 284.
President Monroe, "Views of the President of the United States on the Subject of Internal Improvements" transmitted to Congress in connection with his veto of the Cumberland Road Bill, May 4, 1822 (discussed by Willoughby on the Constitution, 2nd Ed., Secs. 61, 62 and Story on the Constitution, 5th Ed., Secs. 979, *et seq.*)
Story on the Constitution, 5th Ed., Secs. 906-991.

It does not appear that this Court has directly construed the relation of this clause to the power to tax. It has, however, used language indicating this construction.

Gibbons v. *Ogden*, 9 Wheat. 1, at p. 199 contains a statement of Chief Justice Marshall which is so construed

by Mr. Justice Story (Story on the Constitution, 5th Ed., Sec. 927).

U. S. v. *Gettysburg Electric Railway Co.*, 160 U. S. 668, 681.

U. S. v. *Realty Co.*, 163 U. S. 427, 440.

Story on the Constitution, 5th Ed., Sec. 991, contains an enumeration of instances of appropriations which have not been limited to enumerated powers of Congress.

Cooley, Taxation, 4th Ed., Secs. 106, 107, 109.

In *U. S.* v. *Weirton Steel Co.*, 10 Fed. Sup. 55 (February 27, 1935), the Court stated at p. 87:

> "The welfare clause is commonly considered as a specification of the purpose for which money may be appropriated and not as a substantive grant of power."

(2) *Congress shall have power to borrow money on the credit of the United States* (Constitution U. S. Art. I, Sec. 8, Cl. 2). No limitation is expressed. Implicitly funds obtained by the exercise of the borrowing power must be appropriated for a public use. Selection of the objects of such appropriations is a political question to be determined by Congress.

Juilliard v. *Greenman*, 110 U. S. 421.

As to public use see:

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 161 *et seq.*

Clark v. *Nash*, 198 U. S. 361.

Houck v. *Little River Drainage District*, 239 U. S. 254.

(3) Chief Justice Marshall, in that part of the opinion in *M'Culloch* v. *Maryland*, previously quoted, p. 27, *supra*, held that the power to make all laws necessary and proper in executing the foregoing powers included the power of creating a corporation as a means of accomplishing the object of an appropriation by Congress for the general welfare.

Osborn v. *The Bank*, 9 Wheat. 738.
Smith v. *Kansas City Title & Trust Co.* (Federal Farm Loan Case), 255 U. S. 180.

1. Congress Had Power Directly to Use the Public Moneys for the Purpose of Promoting Thrift and Home Financing. Congress Was Not, However, Limited to the Use of Public Moneys by Outright Appropriations, but, Having that Authority, Could Create a Revolving Fund To Be Used Through Loans. Instead of an Outright Appropriation of Public Moneys To Promote Thrift and Home Financing, Congress Chose to Create Corporate Instrumentalities and to Appropriate Funds to Be Used as Revolving Capital Funds of Federal Home Loan Banks and Federal Savings and Loan Associations. The Purpose Thus Subserved, Through the Provisions of the Act, Was a Public Purpose and for the General Welfare.

In Section 5(g) of Home Owners' Loan Act of 1933, Congress authorized the sum of $100,000,000 to be appropriated out of any money in the Treasury not otherwise appropriated, to be immediately available and to remain available until expended to enable the Secretary of the Treasury to make subscriptions for preferred and full-paid income shares of Federal savings and loan associations. Pursuant thereto, Congress in the Fourth Deficiency Act, fiscal year 1933 (48 Stat. 274, 279), appropriated the sum of $50,000,000 to be expended as provided in Sections 5(g) and 5(j) and 6 of such Act (R. Cause No. 55, p. 31).

In Section 6(f) of the Federal Home Loan Bank Act, Congress allocated and made available to the Secretary of the Treasury the sum of $125,000,000 in order to enable the Secretary of the Treasury to subscribe and pay for stock of the Federal home loan banks. Such appropriation by Congress also took the form of creating a revolving capital fund to be used to promote thrift and home financing through loans to thrift and home financing institutions eligible to borrow from such banks.

Congress specified the public purposes to be served by such appropriation as follows:

(*a*) "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes * * *" (Sec. 5(a)).

(*b*) Federal savings and loan associations shall raise their capital only in the form of payments on their shares (Sec. 5(b)). Such associations shall lend their funds on the security of their shares and on the security of first liens upon homes (Sec. 5(c)). There shall be in the judgment of the Board a necessity for such association in the community to be served and a reasonable probability of its usefulness and suecess without undue injury to other thrift and home financing institutions (Sec. 5(e)).

(*c*) Each such association shall automatically become a member of the Federal home loan bank of its district, thus obtaining the privilege of borrowing (upon the security of home mortgages or obligations of the United States or obligations fully guaranteed by the United States) funds with which to make further loans in the financing of homes (Sec. 5(f); Federal Home Loan Bank Act, Sec. 10).

(*d*) To justify subscription for shares of such association by the Secretary of the Treasury, the funds in the judgment of the Board must be necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community (Secs. 5(g) and 5(j)).

(*e*) Such associations are not permitted to be locally taxed in an amount greater than that imposed upon other mutual or cooperative thrift and home financing institutions (Sec. 5(h)).

(*f*) To encourage local thrift and local home financing Congress directed the Secretary of the Treasury to allocate and make immediately available to the Board out of the funds appropriated pursuant to Section 5(g) the sum of $700,000 (Sec. 6).

(*g*) Section 5 is part of:

"An Act to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act,

to increase the market for obligations of the United States and for other purposes" (Title of Home Owners' Loan Act of 1933).

2. Promotion of Thrift and Home Financing Is in the General Welfare of the Nation.

The accumulation of thrifty citizens in thrift and home financing institutions augments the home financing power of the nation. The promotion of thrift is, therefore, not only a public purpose *per se* but serves the public purpose of the promotion of home financing. Provision for adequate means of financing homes is in the general welfare.

The importance of the home to the nation is axiomatic.

The sanctity of the home is recognized in the Constitution. No soldier shall, in time of peace, be quartered in any house without the consent of the owner nor in time of war but in a manner to be prescribed by law (Article III, Amendments to the Constitution of the United States). The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated (Article IV, Amendments to the Constitution of the United States).

Any exigency which arises affecting the welfare of the home vitally affects the welfare of the nation and properly enlists the attention and solicitude of Congress.

3. Having this Power with Respect to the Use of Public Moneys for the General Welfare, Congress Could Exercise Such Power by the Adoption of Appropriate Means to that End and the Creation of Instrumentalities for that Purpose.

As early as 1781 Alexander Hamilton, in a letter to Robert Morse, dealt with the needs of an adequate credit system, in which connection he said:

"To surmount these obstacles, and give individuals ability and inclination to lend, in any proportion to the wants of government, a plan must be devised, which, by incorporating their means together, and uniting them with those of the public, will, on the foundation of that incorporation and union, erect a mass of credit that will supply the defect of moneyed capital, and answer all the purposes of cash; a plan which will offer adventurers im-

mediate advantages, analogous to those they receive by employing their money in trade, and, eventually, greater advantages; a plan which will give them the greatest security the nature of the case will admit for what they lend; and which will not only advance their own interest, and secure the independence of their country, but, in its progress, have the most beneficial influence upon its future commerce, and be a source of national strength and wealth.

"I mean the institution of a NATIONAL BANK. * * *

"The tendency of a National Bank is to increase public and private credit. The former gives power to the State, for the protection of its rights and interests: and the latter facilitates and extends the operations of commerce among individuals. Industry is increased, commodities are multiplied, agriculture and manufactures flourish: and herein consists the true wealth and prosperity of a State." (1 Hamilton's Works, John C. Hamilton, pp. 236, 237.)

In his Report on Manufactures (December 5, 1791), Hamilton said, in part:

"It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money" (3 ibid. 250).

In his letter to George Washington, February 23, 1791, Hamilton further said:

"The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means" (by Congress).

(Hamilton, "Opinion as to the Constitutionality of the Bank of the United States" (4 ibid. 111).

No more serious harm can befall the modern home-owner than the collapse of the facilities of home financing.

Coincident with the advancement of civilization has evolved complexities in the instruments of finance. Economic dependence of the home-owner upon social means of livelihood and upon a vast and complicated credit system has been coincident with the development of the processes of production. The possession of an axe is no longer the sole requisite of having a home.

In the history of the development of the financial system of the United States, the creation of the system of National banking associations in the financial crisis occurring immediately after the War between the States, the creation of the Federal Reserve System in 1913, and the creation of the Federal Farm Loan System in 1916, were the forerunners of the Federal Home Loan Bank System, created by Congress in 1932. Such a Home Loan Bank System was under consideration by Congress as early as 1918. The system has been supplemented by:

(*a*) The system of Federal savings and loan associations;

(*b*) Home Owners' Loan Corporation, to provide emergency relief with respect to home mortgage indebtedness; and

(*c*) Federal Savings and Loan Insurance Corporation, to provide insurance up to the full withdrawal or repurchasable value of the accounts of the members and investors, not in excess of $5,000 to any one member or investor holding withdrawable or repurchasable shares, investment certificates or deposits in thrift and home-financing institutions throughout the United States in the event of an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver or other legal custodian is appointed for an insured institution for the purpose of liquidation (12 U. S. C. Supp. 1724).

In creating the Federal Reserve System, Congress selected the Federal Reserve banks as corporate instrumentalities to accomplish the public requirements for the national fiscal system. In creating the Federal Farm Loan System, Congress likewise selected corporate instrumentali-

ties as the means of aid to agricultural development throughout the country in accordance with a systematic and general plan. In creating the Federal Home Loan Bank System, Congress has employed as corporate instrumentalities the twelve Federal home loan banks to provide a reservoir of credit for home financing. In creating the system of Federal savings and loan associations, Congress again selected corporate instrumentalities to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes through loans by such associations. Through each of these revolving funds created by such system, the effectiveness of the Congressional appropriations made in such cases was multiplied manifold times. In setting up each of these systems, Congress has accomplished that "incorporation and union" of public moneys supplied by the Government with funds supplied by the investing public, envisaged by Hamilton as early as 1781.

The fact that such corporate instrumentalities established by the Federal Government may largely be engaged in private transactions incident to the conduct of their business, that is, in receiving deposits or investments and in making loans or discounts through which they may derive the gains which justify them as business enterprises, does not militate against the authority of Congress to incorporate them as Federal agencies.

In *Osborn* v. *The Bank*, 9 Wheat. 738, the Supreme Court, answering the objection based on the private business of the bank, re-affirmed in the following words its conclusion that, while the bank was dealing with individuals for a private profit, this faculty of lending and dealing in money made the bank an appropriate instrument to aid in carrying on the fiscal operations of the Government and, therefore, it was appropriately regarded as a national instrumentality:

> "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the Government, is admitted; but the bank

is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of *M'Culloch* v. *The State of Maryland,* is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' It is not an instrument which the government found ready-made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage'' (at p. 860).

The revolving fund which such Federal reserve of credit constitutes is thus a union of Federal appropriations and the savings of thrifty citizens. The institutions eligible for membership in Federal home loan banks represent the thrift and initiative of the citizenship of the nation.

When the deluge of foreclosures of home mortgages throughout the United States during the past five years reached the proportions of a national catastrophe, Congress created Home Owners' Loan Corporation to provide emergency relief with respect to home mortgage indebtedness. In the same Act of Congress, provision was made for the creation of a system of Federal savings and loan associations by original incorporation and by conversion of State-chartered thrift and home financing institutions in order to further promote thrift and to further augment credit available for the financing of homes in America. By an appropriation for the purchase by the Secretary of the Treasury of shares of such associations, Congress again effected that union of funds supplied by the Government with funds supplied by thrifty citizens, which Hamilton envisaged, for the accomplishment of the general welfare by more adequate provision for the financing of American homes.

III.

CONGRESS HAS POWER TO CREATE ANY FISCAL AGENCIES WHICH IT DEEMS NECESSARY AND PROPER TO THE OPERATIONS OF THE FEDERAL GOVERNMENT. ITS DECISION IN SUCH MATTERS IS NOT OPEN TO JUDICIAL REVIEW CONGRESS MAY CREATE BY ORIGINAL INCORPORATION AND BY CONVERSION OF STATE INSTITUTIONS, AS IN THIS INSTANCE, MONEYED INSTITUTIONS TO SERVE AS FISCAL AGENTS OF THE GOVERNMENT AND TO PROVIDE A MARKET FOR UNITED STATES BONDS.

Congress has power to create banks as fiscal agents of the Federal Government.

In *M'Culloch* v. *Maryland*, 4 Wheat. 316, at pp. 409, 422-424, the Court said:

"It is not denied that the powers given to the Government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. • • •

"If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy.

"But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. • • •

"After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land."

In *Farmers & Merchants National Bank* v. *Dearing*, 91 U. S. 29, at pp. 33-34, the Court by Mr. Justice Swayne stated:

"The constitutionality of the Act of 1864 is not questioned. It rests on the same principle as the Act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of this court in *M'Culloch* v. *Maryland*, 4 Wheat. 316, and in *Osborn* v. *Bk.*, 9 Wheat. 738, therefore, applies. The national banks organized under the Act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge."

Osborn v. *The Bank, supra.*
Legal Tender Cases, 12 Wall. 457.
Mercantile Bank v. *New York*, 121 U. S. 138.
Davis v. *Elmira Savings Bank*, 161 U. S. 275.
Easton v. Iowa, 188 U. S. 220.
First National Bank v. *The Trust Company*, 244 U. S. 416.
Smith v. *Kansas City Title & Trust Co., supra.*
Hamilton, "Opinion as to the Constitutionality of the Bank of the United States," *supra.*
Story on the Constitution, 5th Ed., Secs. 1259-1271.
Willoughby on the Constitution, 2d Ed., Sec. 80.

1. The Twelve Federal Home Loan Banks Constituting the Federal Home Loan Bank System Are Banking Instrumentalities Lawfully Created for Facilitating the Fiscal Operations of the Government. They Are Designed to Promote Home Financing and to Relieve the Other Financial Institutions in the National Fiscal System from the Demands of Long Term Home Financing Credits.

The Federal home loan banks are fiscal agencies of the Federal Government through which the appropriation of Federal monies are applied for the general welfare in the promotion of home financing.

When designated by the Secretary of the Treasury, each Federal home loan bank shall be a depositary of public

money, except receipts from customs, and may be employed as a financial agent of the Government, under such regulations as may be prescribed by the Secretary of the Treasury (Sec. 14 of the Federal Home Loan Bank Act).

Such banks aid in the exercise of the borrowing power of the Federal Government by provisions for investment and dealing in United States bonds. By Section 11(g) the Federal home loan banks are required to maintain a reserve fund equal to the amounts paid in on the outstanding capital subscriptions of members, plus an amount equal to current deposits received from members, invested in obligations of the United States, deposited in banks, or invested in short term advances to members or non-member borrowers upon certain conditions.

Federal home loan banks are authorized to invest such part of the assets as are not required for advances to members or borrowers as the bank may deem desirable, subject to regulations prescribed by the Federal Home Loan Bank Board, in obligations of the United States (Section 11(h)).

Such banks are required to invest their other reserves in obligations of the United States or in certain other designated securities subject to regulations of the Federal Home Loan Bank Board (Sec. 16).

The Federal Home Loan Bank System lays the foundation for the operations of the System of Federal Savings and Loan Associations and other thrift and home financing institutions in promoting thrift and home financing. Their capital is a revolving capital fund available through loans to members and eligible borrowers to promote home financing.

Such system is thus designed through the operations of the member and borrowing institutions to relieve the other financial institutions in the national fiscal system from the full pressure of demands for long term home financing credit.

2. Federal Savings and Loan Associations Are Lawfully Created Fiscal Agencies of the United States.

(a) They Are Fiscal Agencies for the Application of Public Monies for a Public Purpose and for the General Welfare.

As of September 24, 1935, the Secretary of the Treasury, on behalf of the United States, has invested in the shares of Federal savings and loan associations ~~$45,094,500~~, of which $22,576,700 is invested in associations which have converted under the authority of Section 5(i).

(b) They Are Fiscal Agencies Through Which the Government Supplies Financial Aid, Through Loans on a General Plan, Which It Is Competent for the Government Directly to Supply and to Organize Corporate Instrumentalities to Supply.

Public monies appropriated and invested in Federal savings and loan associations are applied by such associations through loans on the security of homes. Such appropriated moneys, as part of the capital of Federal savings and loan associations, become a revolving fund to be applied in the aid of home financing by home mortgage loans.

(c) They Are Constituted Fiscal Agencies of the Government and Are Bound to Perform All Reasonable Duties Imposed Upon Them as Such Agents.

They are available to the Secretary of the Treasury to perform such reasonable duties as he may require. They are also available as agents for any other instrumentality of the United States when so designated by such instrumentality.

Their status as Federal instrumentalities is further indicated by Section 8 of the Home Owners' Loan Act of 1933 which provides that certain offenses against these associations shall be criminally punished (R. Cause No. 55, p. 32).

(d) They Aid in the Exercise of the Borrowing Power of the Government by the Provisions for Investment and Dealing in United States Bonds.

By Section 5(c) they are authorized to invest any portion of their assets in obligations of the United States or the stock or bonds of Federal home loan banks.

3. Each of the Purposes Above Enumerated Would Alone Be Sufficient to Sustain the Act. From Their Inception to Their Winding Up, Federal Savings and Loan Associations Are, as Above Shown, Financial Institutions Constituting Federal Instrumentalities Whose Main Purpose Is to Perform Governmental Functions. Congress Is the Sole Judge of the Need for These Instrumentalities; Congress Has Measured That Need in Creating Such Instrumentalities.

Congress is not limited with respect to the creation of any fiscal agencies of the United States which in its opinion are necessary and proper. If the agency created is adapted to aid the Government in its fiscal operations in any manner, it is not within the province of the court to review the decision of Congress. The judicial branch of the Government does not question the motives of Congress in the exercise of its constitutional powers.

Veazie Bank v. *Fenno*, 8 Wall. 533.
McCray v. *U. S.*, 195 U. S. 27.
Flint v. *Stone Tracy Co.*, 220 U. S. 107.
Hamilton v. *Kentucky Distillers Warehouse Co.*, 251 U. S. 146.
Smith v. *Kansas City Title & Trust Co., supra.*
Williams v. *Mayor of Baltimore*, 289 U. S. 36.
Home B. & L. Asso. v. *Blaisdell*, 290 U. S. 398.
Nebbia v. *New York*, 291 U. S. 502.

The provisions by Congress for the creation of such instrumentalities are similar in all essential respects to the provisions made by Congress in 1864 for the creation of the System of National Banking Associations. We submit that it was as competent for Congress to create the System of Federal Savings and Loan Associations as it was for Congress to create the System of National Banking Associations. We submit, further, that as stated by this Court in *Casey* v. *Galli, supra*, it was as competent for Congress to provide for the conversion of State-chartered thrift and home financing institutions into Federal savings and loan associations as it was for Congress to provide for the original incorporation of Federal savings and loan associations. The Act is silent as to any assent or permission by the State. No authority from the State is necessary to enable any member of a Federal home loan bank so to change its

organization. The option to do that was given in Section 5(i). The power there conferred was ample.

4. Federal Savings and Loan Associations Are Banking Instrumentalities to Provide Home Mortgage Credit.

The Court below raised the question as to whether Federal savings and loan associations are banking institutions (R. Cause No. 55, p. 63).

The word "bank" is subject to many different interpretations. Michie, on page 6 of Volume 1 of his work on Banks and Banking, gives the following definition:

> "A bank is a *quasi* public institution, for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as currency, or for the exercise of one or more of these functions * * *."

A general definition is found in Volume 3 of Ruling Case Law, at page 375:

> "Strictly speaking the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, but in the progress of events it was extended and bankers assumed to discount bills and notes and to loan money on mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, and banks are frequently said to be of three kinds, viz., of deposit, of discount, and of circulation; and the authorities recognize that any person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, though but one of these functions may be exercised."

In the Federal Farm Loan Case (*Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, at pp. 210, 211, in upholding the power of Congress to create Federal Land Banks and Joint-Stock Land Banks, the Court said:

"A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending, and caring for money. But whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. Furthermore, these institutions are organized to serve as a market for United States bonds. * * *

"We therefore conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions."

The reasoning of the Court in the Federal Farm Loan Case applies as well to the Federal Savings and Loan System as to the Federal Farm Loan System. There need only be substituted the words "home mortgage" for the word "farm" in the quotation above, and the analogy is complete. This definition is controlling in the instant cases. This Court answered a similar attack against the validity of the Federal Land Banks and Joint Stock Land Banks by holding that such "banks" were within the power of the Federal Congress to create.

5. The Federal Home Loan Bank System and the Federal Savings and Loan System Constitute Further Steps in the Development by Congress of the National Fiscal System.

An examination of the history of the development by Congress of the national fiscal system in its various phases to serve the varied financial needs of the United States presents in clear perspective the soundness of the policy of Congress in the creation of these additional Federal financial instrumentalities.

The first step taken by Congress in the establishment of a national fiscal system was the creation of the first Bank of the United States, by Act of Congress approved February 25, 1791 (1 Stat. 191), with a capital stock of ten million dollars, partly subscribed by the Government and partly by private parties. The charter of such bank expired in 1811 and the second Bank of the United States was created by an Act of Congress approved April 10, 1816 (3 Stat. 266).

The constitutionality of the Act creating the second bank of the United States was challenged in the case of *M'Culloch* v. *The State of Maryland, supra.* Its validity was sustained in that historic opinion of Mr. Chief Justice Marshall. The constitutionality of the Bank was again exhaustively reviewed and sustained by Chief Justice Marshall in *Osborn* v. *The Bank, supra.*

The next major step in developing the national fiscal system was the Act of Congress approved June 3, 1864 (13 Stat. 99) which inaugurated the National Banking System. The National Bank Act has always been considered by this Court well-founded in the Constitution.

Legal Tender Cases, supra.
Farmers & Merchants National Bank v. *Dearing, supra.*
Owensboro National Bank v. *Owensboro,* 173 U. S. 664.
Easton v. *Iowa, supra.*

The next step in the extension by Congress of the national fiscal system was the establishment of a banking system in the Post Office Department. A Postal Savings Depositary Office was created in the Post Office Department by an Act of Congress approved June 25, 1910 (36 Stat. 814).

In 1913, the Federal Reserve Act (38 Stat. 251) was enacted in order, as stated in Senate Report No. 133 of the 63rd Congress, first session:

> "To give stability to the commerce and industry of the United States, prevent financial panics or financial stringencies, make available effective commercial credit for individuals engaged in manufacturing, in commerce, in finance, and in business, to the extent of their just deserts; put an end to the pyramiding of the bank reserves of the country and the use of such reserves for gambling on the stock exchange."

The Federal Farm Loan Act was approved July 17, 1916 (39 Stat. 360), which provided for a complete banking system for agriculture. It established the Federal Land Banks and Joint Stock Land Banks to facilitate financial credit to farmers on the security of farm lands. Federal Land Bank loans are, in general, made through National Farm Loan Associations, incorporated under Federal charter. Various amendments have been made in the Act as originally enacted. At the present time such system under the Farm Credit Administration, is composed of:

(*a*) The Federal Land Banks, making long term loans to farmers on the security of farm land through the medium of National Farm Loan Associations;

(*b*) Production Credit Associations, making short

term loans for crop production purposes to farmers on the security of farm produce, farming implements and, when necessary, upon the security of farm lands;

(*c*) Regional Banks for Cooperatives, making loans to cooperative groups of farmers for the orderly marketing of their products;

(*d*) The Federal Intermediate Credit Banks, and Central Bank for Cooperatives which act as reserve banks for Production Credit Associations and Regional Banks for Cooperatives.

Such system was attacked on the grounds that the establishment of a banking system created solely for the assistance of the farmers of the United States was not a banking system within the purview of the powers of Congress as expounded in the M'Culloch and Osborne cases. The validity of the Federal Farm Loan System was sustained by this Court in *Smith* v. *Kansas City Title & Trust Co., supra.*

The next step in the expansion of the national fiscal system was provision for a complete banking system for home financing. A bill to create home mortgage banks was first introduced in 1918, at the instigation of the Secretary of Labor. As was pointed out to the Congress by the House Committee on Banking and Currency in its report (H. Rept. No. 1418, 72d Cong. 1st Sess., p. 3) on H. R. 12280, which became the Federal Home Loan Bank Act, approved July 22, 1932:

> "Legislation of this character has long been considered. During President Wilson's second administration, under the sponsorship of his Secretary of Labor, Wilson, the first home-loan bank measure was proposed and the Banking and Currency Committee of both Houses considered it at the time. There has been a continued interest in and need for an agency to serve the small home owner and home buyer in the cities and small towns, much after the fashion that the Federal reserve system serves the commercial interests of the country and the Federal farm loan system serves, or supplies credit to, the farmer. The need for the home mortgage discount banks has been much accentuated by the present economic conditions."

It became apparent in 1933 that the Federal reserve of home-mortgage credit created by the Federal Home Loan

Bank System was not adequate to meet the exigencies of the depression as it affected home financing. Congress enacted Home Owners' Loan Act of 1933 to provide emergency relief to home owners. In the discussions of that bill on the floors of the House and the Senate, the need for further provision for direct loans to home owners was emphasized (Congressional Record, Apr. 27, 1933, p. 2479; June 5, 1933, pp. 2975, 2977, 2987) and the System of Federal savings and loan associations was substituted by Section 5 of Home Owners' Loan Act of 1933 for the previous provision providing for direct loans to home owners (Section 4(d) of the Federal Home Loan Bank Act (47 Stat. 727), which was repealed by Section 3 of Home Owners' Loan Act of 1933 (48 Stat. 129)).

It is apparent from the history of the development of the national fiscal system in the United States that the policy of Congress in creating the Federal Home Loan Bank System and the Federal Savings and Loan System is but the normal extension to the home loan field of the historical policy of Congress theretofore exercised in the commercial banking and farm loan fields. The creation of the Federal Home Loan System in its entirety is but a normal forward step in the development of the national fiscal system. The Federal Reserve System and the National Banking System made provision for short term and general commercial banking credit. The Federal Farm Loan System made provision for the financing of agriculture. The Federal Home Loan System provides for the adequate financing of American homes and is not, we submit, less within the power of Congress. Whether such power is viewed as exercised under the power to tax and borrow for the general welfare or under its powers to create Federal fiscal agencies, Congress has such power.

To meet home financing needs, Congress could have broadened the lending powers of the Federal Reserve System or the Federal Farm Loan System. With equal validity Congress created a separate Federal Home Loan System.

IV.

THERE WAS NO DELEGATION OF LEGISLATIVE AUTHORITY BY CONGRESS IN AUTHORIZING THE FEDERAL HOME LOAN BANK BOARD TO MAKE RULES AND REGULATIONS PROVIDING FOR THE ORGANIZATION, INCORPORATION, EXAMINATION, OPERATION, CONVERSION, REORGANIZATION, CONSOLIDATION, MERGER OR LIQUIDATION OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS.

This Court has clearly delimited the bounds of delegation by Congress to administrative officers or bodies. When Congress has set up a general policy and has fixed a standard, this Court has held that the delegation to administrative officers of the power to fill up the details by prescribing administrative rules and regulations is not a delegation of legislative power.

In *U. S.* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, the Court, by Mr. Justice Sutherland, rejected the contention that certain provisions of the Food and Drugs Act of 1906 were a delegation of legislative authority, and said:

> "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations" (p. 85).

In *Buttfield* v. *Stranahan*, 192 U. S. 470, the Court held that the authority granted to the Secretary of the Treasury to establish, upon the recommendation of a board of experts, standards of purity, quality and fitness for tea imported into the United States was not a delegation of legislative authority. The Court said, at page 496:

> "This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute * * *. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

In *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, the Court held that the power given to the President of the United States by the Tariff Act of October 1, 1890, was not a delegation of legislative authority because:

1. Congress had set up a general policy.
2. Action by the President was limited to:

(*a*) The determination of a certain state of facts enumerated in the statute.

(*b*) Execution of reciprocal trade agreements when such facts were determined.

The Court in that case at p. 693 cited *Cincinnati W. & Z. R. Co.* v. *The Clinton County Commissioners* (1 Ohio State 88) from which it quoted the following:

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The Court further said:

"What the President was required to do was simply in execution of the Act of Congress."

In *J. W. Hampton Jr. & Co.* v. *U. S.*, 276 U. S. 394, where the Court dealt with the so-called "flexible tariff provision" of the Act of September 21, 1933 (42 Stat. 858, 941) and with the authority which it conferred upon the President, the Court said:

"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority" (p. 409).

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Court, by Mr. Chief Justice Hughes, developed the distinc-

tion between the delegation of legislative power and conferring authority for its execution by an administrative officer or body. The opinion in that case reviewed the leading cases decided by this Court since the early case of *The Brig Aurora*, 7 Cr. 382. For that reason, we do not cite further cases at this point.

The powers devolving upon the Federal Home Loan Bank Board are:

(1) To issue charters to Federal savings and loan associations under rules and regulations prescribed by it.

(2) To make rules and regulations regarding conversion.

(3) To make rules and regulations for the reorganization, consolidation, merger or liquidation of Federal savings and loan associations, including the power to appoint the Federal Savings and Loan Insurance Corporation as the conservator or receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure thereof.

(4) To make rules and regulations regarding the operations of Federal savings and loan associations and their examination by the Board.

1. The Board's Power to Issue Charters Is an Administrative Act in the Execution of Congressional Policy Upon Its Finding of Certain Facts.

In the issuance of charters, the Board is required to find the following facts:

(*a*) The persons permitted to organize a Federal savings and loan association are of good character and responsibility.

(*b*) A necessity for such Federal savings and loan association exists in the community to be served.

(*c*) There is a reasonable probability of its usefulness and success.

(*d*) Such organization will not unduly injure properly conducted existing local thrift and home financing institutions (Sec. 5(e)).

The policy prescribed by Congress with respect to chartering Federal savings and loan associations applies both to original incorporation and conversion of State-chartered

members of Federal home loan banks into Federal savings and loan associations.

The primary standards set up by Congress are:

(*a*) The Board is authorized to issue charters in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes (Sec. 5(a)).

(*b*) The Board must give primary consideration to the best practices of local mutual thrift and home financing institutions which have been developed in the United States during the past 100 years (Sec. 5(a)).

(*c*) There shall be a necessity for such organization in the community to be served (Sec. 5(e)).

(*d*) The organization of a Federal savings and loan association in the community to be served shall not operate to injure properly conducted local thrift and home financing institutions already existing in such community. Only persons of good character and responsibility shall be permitted to effect such organization under the statute. There shall be a reasonable probability of the usefulness and success of the association in fulfilling the purposes of its incorporation (Sec. 5(e)).

(*e*) The charter shall provide that such associations shall raise their capital only in the form of payments on shares. No deposits shall be accepted and the borrowing power shall be limited, The association shall operate on a mutual or cooperative basis as established by the best practices of local mutual thrift and home financing institutions. It shall operate as a community or local institution. Its loans may not be made upon property beyond 50 miles of the home office unless prior to conversion from a State-chartered institution the association had made loans upon property beyond said 50-mile limit. Such associations shall lend their funds on the security of their shares in aid of the thrift objective of Congress and on the security of first liens upon homes or combination home and business property in aid of the home financing objective of Congress. Limitations upon the size of single loans and restriction of loans on other improved real estate are fixed by the statute. The investments of the association are limited to obligations of the United States or the stock or bonds of a Federal home loan bank (Sec. 5(a), (b), (c)).

The authority which devolves upon the Federal Home Loan Bank Board in the execution of the Congressional policy upon the finding of certain facts are similar to the authority which devolved upon the Comptroller of the Currency under The National Bank Act with respect to the issuance of charters and certificates of authority to commence business to National Banking Associations. The Federal Farm Loan Act, 39 Stat. 360, similarly conferred administrative authority in connection with the incorporation and conversion of cooperative associations to provide credit facilities for agriculture. Although no case decided by the courts of the United States has been found which contains any holding regarding the validity of the delegation of authority contained in The National Bank Act or the Federal Farm Loan Act (12 U. S. C. Secs. 641 *et seq.*) the validity of those statutes are today beyond question.

State Courts have been frequently required to decide whether a general corporation law which provided for the issuance of charters by administrative officers or bodies involved an unconstitutional delegation of legislative authority.

In *Granby Mining & Smelting Co.* v. *Richards* (95 Mo. 106), the Court said:

> "That the power to make laws cannot be delegated by legislature is conceded on all hands * * *. Morawetz says: 'It seems, therefore, that a general power to confer corporate franchises cannot be delegated by the legislature to any other agent. However, where the legislature has enacted that corporations may be formed upon compliance with certain conditions, it is no objection that ministerial duties, such as the issuing of a certificate or charter, must be performed by some officer before the incorporation takes effect' (1 Morawetz Private Corporations, Section 15). That corporations may be organized under general laws is no longer a debatable question."

In *Franklin Bridge Company* v. *Young Wood* (14 Georgia 80) the Court held that a general corporation statute was constitutional which provided that the court of the county in which an association desired to become incorporated could issue a charter upon compliance with the provisions of the general corporation law.

"The delegation to particular persons, courts or boards of the power to do such ministerial acts as may be necessary to bring into existence corporations, the formation of which the legislature has authorized, is not a violation of this constitutional principle" (1 Fletcher Encyclopedia of Corporations, 438).

The question of delegation of legislative authority was implicit in the two leading cases which have passed upon the validity of The National Bank Act and the Federal Farm Loan Act.

Casey v. *Galli, supra.*
Smith v. *Kansas City Title & Trust Co., supra.*

2. The Board's Power to Regulate the Conversion of State Institutions Into Federal Savings and Loan Associations Is an Administrative Act in the Execution of Congressional Policy Upon Its Finding of Certain Facts.

(a) The Word "Conversion" is a Word of Art Which Has Expressed for More Than 70 Years a Legislative Policy Both as to Legal Effect and Legal Procedure.

The Board must make the same determinations of fact and must in addition determine that the institution proposing to convert is a member of a Federal home loan bank. It is further limited by the meaning of the word "conversion" as established as a word of art by more than 70 years of legislative use and judicial construction.

Section 5(i) does not contain all of the detailed provisions regarding applications for permission to convert found in The National Bank Act with respect to the conversion of State banks into National Banking Associations or in the Act of March 4, 1923 (42 Stat. 1454, 1461), regarding the conversion of agricultural or live stock financing corporations into National Agricultural Credit Corporations. Such procedure regarding how many persons may apply for conversion or execute such petitions is a mere detail. It is subject to delegation to administrative officers. However, the word "conversion" today connotes both procedure and legal effect in view of the more than 70 years history of the words in Federal Statutes and decided cases. The word "conversion" used in Section 5(i) brings with it that

history imbedded in The National Bank Act and in the cases regarding conversion of State banks into National Banking Associations which have been before the Courts of the United States.

Metropolitan Nat. Bank v. *Claggett,* 141 U. S. 520.
Michigan Ins. Bank v. *Eldred,* 143 U. S. 293.
Coffee v. *Nat'l Bank,* 46 Mo. 140.
Scofield v. *State Nat'l Bank,* 9 Neb. 316.
City Nat'l Bank v. *Phelps,* 97 N. Y. 44;
Thorp v. *Wegefarth,* 56 Pa. 82.
Kelsey v. *The Nat'l Bank,* 69 Pa. 426.

(b) The Essential Legal means of Exercising the Right and Power to Convert Are Specified in the Statute.

The statute expressly provides the essential legal procedure of conversion, to-wit:

(*a*) The institution proposing to convert must be a member of a Federal Home Loan Bank.

(*b*) It must convene a legal meeting of stockholders to consider such action.

(*c*) It must obtain at such legal meeting a vote in favor of conversion of 51 per cent or more of the votes cast.

The authority of the Federal Home Loan Bank Board to make rules and regulations with respect to the conversion of any member of a Federal Home Loan Bank into a Federal savings and loan association is limited in scope by the statutory declaration of policy and the primary standards set up by Congress with respect to the original incorporation of Federal savings and loan associations.

The National Bank Act, *supra,* provided for the Comptroller of the Currency to give a certificate under his hand and official seal representing the finding of facts by such administrative official as a condition precedent to the effectiveness of the exercise by a State bank of the right and power to convert into a National Banking Association. This Court has at least impliedly sustained such administrative acts of the Comptroller of the Currency.

Casey v. *Galli, supra.*
Ex parte Worcester County National Bank, 279 U. S. 347.

3. The Words "Re-organize, Consolidate, Merger or Liquidate" Relating to Federal Financial Institutions Are Words of Art Which Have Expressed for Many Years a Legislative Policy Both as to Legal Effect and Legal Procedure.

The reorganization, consolidation, merger or liquidation of Federal savings and loan associations are legal ends to be attained when any Federal savings and loan association fails to fulfill the general policy of Congress for such institutions, to-wit:

(*a*) It no longer is an institution in which people may safely invest their funds.

(*b*) It is unable to provide for the financing of homes.

(*c*) The persons in control of the organization are not persons of good character or responsibility; the necessity for such an organization in the community to be served no longer exists; there is no longer a reasonable probability of its usefulness and success; its continued operation would be injurious to properly conducted local thrift and home financing institutions existing in the community; it has violated the express restrictions of the statute in its operations, *e. g.*, its loans exceed legal limits as to amount, character and location, or it has raised its capital in an unauthorized manner, accepted deposits or exceeded legal limits of borrowing.

The authority devolving upon the Board in these matters rests, therefore, upon the determination of certain facts specified by the statute in the accomplishment of the general policy laid down by Congress.

Similar authority devolved upon the Comptroller of the Currency under The National Bank Act and has been exercised with the tacit consent of the Courts of the United States for many years.

4. The Board's Power to Make Rules and Regulations Is Administrative in Character. The Exercise of Such Power Consists Merely of Prescribing the Detailed Means of Compliance with Legislative Policy Expressed in the Statute in Order to Supply the Minutiae Which Compose the Primary Standards Fixed by Congress and the Detailed Procedural Steps for the Accomplishment of the Legislative Objectives Fixed by the Statute.

V.

THE CONVERSION OF A MEMBER OF A FEDERAL HOME LOAN BANK INTO A FEDERAL SAVINGS AND LOAN ASSOCIATION DOES NOT DEPRIVE EITHER THE STATE WHICH INCORPORATED SUCH INSTITUTION OR ANY OF THE STOCKHOLDERS OF SUCH INSTITUTION OF PROPERTY OR CONTRACT RIGHTS WITHOUT DUE PROCESS OF LAW.

The Court below raises further questions regarding the constitutionality of Section 5(i) as follows:

"Their charters do not authorize them to divest themselves of the corporate charter conferred upon them by the laws of the State. They have only the powers emanating from the State. These powers must be used as prescribed by the State and with due consideration for the contractual rights between the stockholders and the corporation existing by reason of State law and the charter of the corporation (R. Cause No. 55, p. 55) • • •. There can be no doubt but that it was intended by the framers of the Constitution to reserve in the State the power to alter or repeal the charter of any corporation created by the Legislature. The Constitution having thus limited the power of the Legislature, it would seem to follow that the Legislature is without authority to divest itself of the power reserved to it by the Constitution. But if it should be held that the Legislature has such power, it is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon nonconsenting members of the corporation. A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder • • •. And there is a fundamental and material difference between being a member of a building and loan association over which the representatives chosen by the people of this State have the reserve power of control and being a member of one created by the legislative body of a different sovereign power (R. Cause No. 55, p. 59). • • • Since respondents' charters do not provide for transmutation and no authority emanating from the State of Wisconsin accords them the privilege, or attempts to confer corporate power upon them to transmute, two questions are suggested

First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation?

Second, If it be found that it was the purpose of Congress by that Act thus to increase respondents' corporate powers, then has Congress the power to accomplish this result? (R. Cause No. 55, p. 60).

* * * The exercise of such a power would do two things; first, it would enable a building and loan association to escape from regulatory control reserved by the State, and second, it would divest stockholders of their rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. * * * Any method under which a State association seeks to transfer itself into a Federal group without consideration of the contractual relation existing between it and the State would seem to be ineffective. It has only the powers emanating from the State and these must be used as prescribed by the State with due consideration for the contractual rights between stockholders and the association existing by reason of State laws and the charter of the corporation" (R. Cause No. 55, pp. 61-62).

The pleadings in the three causes herein raise the issue whether the provisions of Section 5(i) deny to all stockholders of the association who do not desire to convert the equal protection of the laws and deprive them of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States (R. Cause No. 55, p. 14, Causes Nos. 56 and 57, pp. 26). The Fourteenth Amendment to the Constitution of the United States is ineptly referred to. It has no bearing upon the power of Congress.

The burden of the foregoing statements of the Court

below seems to be that conversion pursuant to Section 5(i) would be

(*a*) A deprivation of property of the State in the State-chartered institutions which have converted into Federal savings and loan associations or the impairment of the rights of contract of the State, and

(*b*) The deprivation of the property of non-consenting stockholders of such institutions in the State charter or an impairment of the contractual relations between the stockholders of the converted institutions.

We submit that whatever be the exact point of such statement of the Court below, they are not well taken.

In *Norman* v. *Baltimore and Ohio Railway Co.*, 294 U. S. 240, the Court said:

"This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them" (p. 307).

In *New York* v. *U. S.*, 257 U. S. 591, the precise question of the right of Congress, in the exercise of its constitutional powers, to invalidate a charter granted by a State was before this Court.

Mr. Chief Justice Taft said:

"The next objection is that the State has a charter contract with the New York Central Railroad Company • • • and that, if the Transportation Act permits the Interstate Commerce Commission, by such an order, to enable the railroad company to violate its contract, • • • it deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 230, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96: 'Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' *Louisville & N. R. Co.* v. *Mottley*, 219 U.

S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265. See also *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367" (pages 600-601).

In *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 435, this Court stated:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

It would seem that the question was definitely settled by *Casey* v. *Galli*, *supra*. In that case, for the purpose of "due process," the facts were on all fours. The bank, under a similar statute (Section 44 of the Act of Congress approved June 3, 1864, 13 Stat. 99, 112) converted itself into a National bank. Its action was held valid. The conversion statute was held constitutional. Such conversion was not a deprivation of property without due process of law nor an impairment of contract rights. We submit that there is none in these causes.

It is, therefore, respectfully submitted that this Honorable Court should reverse the decision of the Supreme Court of the State of Wisconsin.

HORACE RUSSELL,
EMERY J. WOODALL,
Attorneys for Petitioners.

LYMAN W. SHERWOOD,
JOHN H. SCHLINTZ,
B. F. SALTZSTEIN,
E. J. GROSS,
WALLACE REISS,
Of Counsel,
J. ALDRICH HALL,
On the Brief.

APPENDIX A

Section 5 of Home Owners' Loan Act of 1933, as Amended.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided,* That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter.[1]

(d) The Board shall have full power to provide in the

[1] Sec. 18 of An Act to Provide Additional Home-Mortgage Relief amended sec. 5. (c) of the Home Owners' Loan Act of 1933 by striking out the period after the word "Bank" and inserting in lieu thereof a colon and the phrase above set forth in the text.

rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at

no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such

action; but such conversions shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.[2]

(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be

[2] As amended by sec. 6 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation. Sec. 5 (i) read originally as follows:
"Any member of a Federal Home Loan Bank my convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided by the law under which it operates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.[3]

(k) When designated for that purpose by the Secretary of the Treasury, and Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.[4]

48 Stat. 128, 643; Public No. 76, 74th Cong., approved May 28, 1935.

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[3] Subsec. (j) was added by sec. 5 of Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

[4] Subsec. (k) was added by sec. 5 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation.

APPENDIX B

Federal Home Loan Bank Act, as Amended.

AN ACT To create Federal Home Loan Banks, to provide for the supervision thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Home Loan Bank Act."

DEFINITIONS

SEC. 2. As used in this Act—

(1) The term "board" means the Federal Home Loan Bank Board.

(2) The term "Federal Home Loan Bank" means a bank established by the board under authority of this Act.

(3) The term "State" includes the District of Columbit, Puerto Rico, the Virgin Islands of the United States, and the Territories of Alaska and Hawaii.

(4) The term "member" (except when used in reference to a member of the board) means any institution which has subscribed for the stock of a Federal Home Loan Bank.

(5) The term "home mortgage loan" means a loan made by a member or a nonmember borrower upon the security of a home mortgage.

(6) The term "home mortgage" means a mortgage upon real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling for not more than four families, and shall include, in addition to first mortgages, such classes of first liens as are commonly given to secure advances on real estate by institutions authorized under

this Act to become members, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.[1]

(7) The term "unpaid principal", when used in respect of a loan secured by a home mortgage means the principal thereof less the sum of (1) payments made on such principal, and (2) in cases where shares or stock are pledged as security for the loan, the payments made on such shares or stock plus earnings or dividends apportioned or credited thereon.

(8) An "amortized" or "installment" home mortgage loan shall, for the purposes of this Act, be a home mortgage loan to be repaid or liquidated in not less than eight years by means of regular weekly, monthly, or quarterly payments made directly in reduction of the debt or upon stock or shares pledged as collateral for the repayment of such loan.

(9) The term "nonmember borrower" includes an institution authorized to secure advances from a Federal Home Loan Bank under the provisions of section 6 (e).

FEDERAL HOME LOAN BANKS

SEC. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall

[1] Sec. 2 (6) of the Federal Home Loan Bank Act originally read as follows:

"(6) The term 'home mortgage' means a first mortgage upon real estate, in fee simple, or leasehold under a renewable lease for not less than ninety-nine years, upon which there is located a dwelling for not more than three families, and shall include, in addition to first mortgages, such classes of first liens as are commonly given to secure advances on real estate by institutions authorized under this Act to become members, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby."

SEC. 507 of the National Housing Act amended sec. 2 (6) of the Federal Home Loan Bank Act to read as above set forth in the text, except that the word "four" read "three."

SEC. 1 of An Act to Provide Additional Home-Mortgage Relief struck out the word "three" and inserted in lieu thereof the word "four."

contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established.

ELIGIBILITY OF MEMBERS AND NONMEMBER BORROWERS

SEC. 4. (a) Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank, shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if such institution (1) is duly organized under the laws of any State or of the United States; (2) is subject to inspection and regulation under the banking laws, or under similar laws, of the State or of the United States; and (3) makes such home mortgage loans as, in the judgment of the board, are long-term loans (and in the case of a savings bank, if, in the judgment of the board, its time deposits, as defined in section 19 of the Federal Reserve Act, warrant its making such loans). No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act.

(b) An institution eligible to become a member or a nonmember borrower under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board.

(c) Notwithstanding the provisions of clause (2) of subsection (a) of this section requiring inspection and regulation under law as a condition with respect to eligibility for

membership, any building and loan association which would be eligible to become a member of a Federal Home Loan Bank except for the fact that it is not subject to inspection and regulation under the banking laws or similar laws of the State in which such association is organized shall, upon subjecting itself to such inspection and regulation as the board shall prescribe, be eligible to become a member.[1]

SEC. 5. No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after the enactment of this Act.

CAPITAL OF FEDERAL HOME LOAN BANKS AND SUBSCRIPTIONS THERETO

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

(b) The capital stock of each Federal Home Loan Bank

[1] As amended by sec. 3 of Home Owners' Loan Act of 1933, repealing subsec. (d) of sec. 4. Subsec. 4 (d) formerly read as follows:

"Any home owner who comes within the limits of this Act and who is unable to obtain mortgage money from any other source may obtain same from any bank organized under this Act: *Provided*, That this subsection shall not be effective when the Federal Government has had its stock retired."

shall be divided into shares of a par value of $100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

(c) The original stock subscription for each institution eligible to become a member under section 4 shall be an amount equal to 1 per centum of the aggregate of the unpaid principal of the subscriber's home mortgage loans, but not less than $500. The board shall from time to time adjust the amount of stock held by each member so that, as nearly as possible, such member shall at all times have invested in the stock of the Federal Home Loan Bank at least an amount calculated in the manner provided in the preceding sentence (but not less than $500). If the board finds that the investment of any member in stock is greater than that required under this section, upon application of such member, the bank shall pay such member for each share of stock in excess of the amount so required an amount equal to the value of such stock, or, at the election of the bank, the whole or any part of the payments which would be so made shall be credited upon the indebtedness of the member to the bank. In either such event, stock equal in value to the amount of the payment or credit, or both, as the case may be, shall be surrendered and canceled. No share of stock shall be surrendered and canceled if the effect of such surrender and cancellation would be to violate the provisions of section 10 (c) requiring the amount of stock held by such member to equal at least one-twelfth of the outstanding advances to such member.[1]

(d) Stock subscriptions other than by the United States shall be paid for in cash, and shall be paid for at the time of application therefor, or, at the election of the subscriber, in installments, but not less than one-fourth of the total amount payable shall be paid at the time of filing application, and a further sum of not less than one-fourth of such total shall have been paid at the end of each succeeding period of four months.

(e) If the law of the State under which an institution described in section 4 operates does not permit such insti-

[1] As amended by sec. 509 of the National Housing Act. The amendment substituted the figure $500 in lieu of $1,500 wherever it appears in sec. 6 (c).

tution to subscribe for stock in the Federal Home Loan Bank but if such institution has the power to borrow money and give security therefor, the board may permit such institution to obtain advances on the same terms and conditions and subject to the same limitations as members (except that such institution shall not be required, during the period during which advances may be made under this subsection, to subscribe for stock in the Federal Home Loan Bank or to deposit such stock as collateral security as required in section 10), but such institution shall be required to keep on deposit such security, in addition to home mortgages, for such advances, as the board shall determine, which shall equal in value 1 per centum of the aggregate unpaid principal of such institution's home mortgage loans (but not less than $500).. No advance to any such institution shall be made under authority of this subsection after the State in which the institution is organized enacts legislation authorizing such institution to subscribe for Federal Home Loan Bank stock or after the expiration of the next regular session of the legislature of such State begun after the enactment of this Act, whichever is earlier. If, at the end of such time, such institution is not authorized to subscribe for stock, the bank shall proceed to liquidate the indebtedness of such institution to the bank and to terminate its relations with such institution. No advance shall be made under authority of this subsection which matures more than one year after the advance is made, but the bank may renew any such advance for yearly periods, or less, thereafter. The maturity of no advance authorized under this subsection shall be later than the time of the enactment of legislation authorizing such institution to become a member or the expiration of such session of the legislature of the State, whichever is earlier.*

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Pay-

* As amended by sec. 509 of the National Housing Act. The amendment substituted the figure $500 for the figure $1,500 which appeared in sec. 6 (e) of the original Act.

ments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States for the purchase of stock under this Act shall not exceed $125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

"In order to enable the Secretary of the Treasury to make payments upon stock of Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of $125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary."

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f), such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank, and with the approval of the board, be paid off at par and retired in whole or in part; and the board may at any time require such stock to be paid off at par and retired in whole or in part if in the opinion of the board the Federal Home Loan Bank has resources available therefor: *Provided*, That accumulated dividends, as provided in subsection (k), have been paid.

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be

transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and, upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

(j) A Federal Home Loan Bank may, with the approval of the board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become a member.

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.*

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* As amended by sec. 2 of An Act to Provide Additional Home-Mortgage Relief. Sec. 6 (k) of the Federal Home Loan Bank Act formerly read as follows:

"All stock of any Federal Home Loan Bank shall share in dividend distributions without preference, except that stock subscribed for by the United States shall be entitled to dividends at a rate of 2 per centum per annum cumulative from the date of investment but in any case in which the rate of dividend is in excess of 2 per centum, the stock subscribed for by the United States shall be entitled to dividends at a rate not in excess of that paid on other stock."

SEC. 7.[7] (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected under this subsection shall expire at the end of the calendar year 1936.[8]

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[7] The amendments made by sec. 3 of An Act to Provide Additional Home-Mortgage Relief to sec. 7 of the Federal Home Loan Bank Act are not effective until Jan. 1, 1936. Sec. 7 of the Federal Home Loan Bank Act, as set forth in footnote number 8, is in effect until Jan. 1, 1936.

[8] Subsections (a), (b), and (c) of sec. 7 of the Federal Home Loan Bank Act originally read as follows:

"SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of eleven directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

"(b) Two of such directors shall be appointed by the board. The terms of such directors shall expire one year and two years, respectively, from the end of the calendar year 1932, and their successors shall be appointed by the board for terms of three years.

"(c) Nine of such directors, three of whom shall be known as class A directors, three of whom shall be known as class B directors, and three of whom shall be known as class C directors, shall be first appointed by the board, and shall serve until the end of the calendar year 1932. Their successors shall be elected as provided in subsection (d),

(e)* The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated as groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the membership of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f)* Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g)* The board shall designate one of the directors of each bank to be chairman, and one to be vice chairman, of the board of directors of such bank.

(h)* If at any time when nominations are required, members shall hold less than $1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which

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and of such successors first elected one of each such class shall serve for one, two, and three years, respectively. Thereafter all such directors shall serve for three years. Directors of classes A, B, and C, whether appointed or elected, shall be chosen from among persons connected with the home-financing business."

Sec. 3 (a) of An Act to Provide Additional Home-Mortgage Relief amended subsections (a), (b), and (c) of sec. 7 of the Federal Home Loan Bank Act to comprise four subsections to read as set forth above in the text; this amendment is not effective until Jan. 1, 1936 (see footnote 7, supra).

* As amended by sec. 3 (b) of An Act to Provide Additional Home-Mortgage Relief, by relettering subsections (d), (e), (f), (g), (h), and (i) of sec. 7 of the Federal Home Loan Bank Act as subsections (e), (f), (g), (h), (i), and (j), respectively. This amendment is not effective until Jan. 1, 1936.

such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i)* Each bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j)* Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

EXAMINATIONS AND STUDIES BY THE BOARD

SEC. 8. The board shall cause to be made from time to time examinations of the laws of the various States of the United States and the regulations and procedure thereunder governing conditions under which institutions of the kinds which may become members or nonmember borrowers under this Act are permitted to be formed or to do business, or relating to the conveying or recording of land titles, or to homestead and other rights, or to the enforcement of the rights of holders of mortgages on lands securing loans, or otherwise. If any such examination shall indicate, in the opinion of the board, that under the laws of any such State or the regulations or procedure thereunder there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this Act, the board may withhold or limit the operation of any Federal Home Loan Bank in such State until satisfactory conditions of law, regulation, or procedure shall be established. In any State where State examination of members or nonmember

* As amended by sec. 3 (b) of An Act to Provide Additional Home-Mortgage Relief, by relettering subsections (d), (e), (f), (g), (h), and (i) of sec. 7 of the Federal Home Loan Bank Act as subsections (e), (f), (g), (h), (i), and (j), respectively. This amendment is not effective until Jan. 1, 1936.

borrowers is deemed inadequate for the purposes of the Federal Home Loan Banks, the board shall establish such examination, all or part of the cost of which may be considered as part of the cost of making advances in such State. The banks and/or the board may make studies of trends of home and other property values, methods of appraisals, and other subjects such as they may deem useful for the general guidance of their policies and operations and those of institutions authorized to secure advances.

FEDERAL SAVINGS AND LOAN ADVISORY COUNCIL

SEC. 8a.[10] There is hereby created a Federal Savings and Loan Advisory Council, which shall consist of one member for each Federal Home Loan Bank district to be elected for each Federal Home Loan Bank district to be elected annually by the board of directors of the Federal Home Loan Bank in such district and six members to be appointed annually by the Board. Each such elected member shall be a resident of the district for which he is elected. All members of the Council shall serve without compensation, but shall be entitled to reimbursement from the Board for traveling expenses incurred in attendance at meetings of such Council. The Council shall meet at Washington, District of Columbia, at least twice a year and oftener if requested by the Board. The Council may select its chairman, vice chairman, and secretary, and adopt methods of procedure, and shall have power—

(1) To confer with the Board and board of trustees of the Federal Savings and Loan Insurance Corporation on general business conditions, and on special conditions affecting the Federal Home Loan Banks and their members and such Corporation.

(2) To request information, and to make recommendations, with respect to matters within the jurisdiction of the Board and the board of trustees of such Corporation.

ELIGIBILITY TO SECURE ADVANCES

SEC. 9. Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such application shall be in such form as

[10] Sec. 8a was added by sec. 4 of An Act to Provide Additional Home-Mortgage Relief.

shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe.

ADVANCES TO MEMBERS

SEC. 10. (a) Each Federal Home Loan Bank is authorized to make advances to its members, upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. Any such advance shall be subject to the following limitations as to amount:

(1) If secured by a mortgage insured under the provisions of title II of the National Housing Act, the advance may be for an amount not in excess of 90 per centum of the unpaid principal of the mortgage loan.

(2) If secured by a home mortgage given in respect of an amortized home mortgage loan which was for an original term of six years or more, or in cases where shares of stock, which are pledged as security for such loan, mature in a period of six years or more, the advance may be for an amount not in excess of 65 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of the advance exceed 60 per centum of the value of the real estate securing the home mortgage loan.

(3) If secured by a home mortgage given in respect of any other home mortgage loan, the advance shall not be for an amount in excess of 50 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of such advance exceed 40 per centum of the value of the real estate securing the home mortgage loan.

(4) If secured by obligations of the United States, or obligations fully guaranteed by the United States, the advance shall not be for an amount in excess of the face value of such obligations.[11]

[11] Sec. 10 (a) of the Federal Home Loan Bank Act read originally as follows:

"Each Federal Home Loan Bank is authorized to make advances to members and nonmember borrowers, upon the security of home mortgages, such advances to be made subject to such regulations, restric-

(b) No home mortgage shall be accepted as collateral security for an advance by a Federal Home Loan Bank if, at the time such advance is made (1) the home mortgage loan secured by it has more than twenty years to run to maturity, or (2) the home mortgage exceeds $20,000, or [12] (3) is past due more than six months when presented, unless the amount of the debt secured by such home mortgage is less than 50 per centum of the value of the real estate with

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tions, and limitations as the board may prescribe. Any such advance shall be subject to the following limitations as to amount:

"(1) If secured by a home mortgage given in respect of an amortized home mortgage loan which was for an original term of eight years or more, in cases where shares of stock, which are pledged as security for such loan, mature in a period of eight years or more, the advance may be for an amount not in excess of 60 per centum of the unpaid principal of the home mortgage loan; in no case shall the amount of the advance exceed 40 per centum of the value of the real estate securing the home mortgage loan.

"(2) If secured by a home mortgage given in respect of any other home mortgage loan, the advance shall not be for an amount in excess of 50 per centum of the unpaid principal of the home mortgage loan; in no case shall the amount of such advance exceed 30 per centum of the value of the real estate securing the home mortgage loan."

Sec. 501 of the National Housing Act amended sec. 10 (a) of the Federal Home Loan Bank Act to read as follows:

"Sec. 10. (a) Each Federal Home Loan Bank is authorized to make advances to its members, upon the security of home mortgages, subject to such regulations, restrictions, and limitations as the board may prescribe. Any such advance shall be subject to the following limitations as to amount:

"(1) If secured by a mortgage insured under the provisions of title II of the National Housing Act, the advance may be for an amount not in excess of 90 per centum of the unpaid principal of the mortgage loan.

"(2) If secured by a home mortgage given in respect of an amortized home mortgage loan which was for an original term of eight years or more, or in cases where shares of stock, which are pledged as security for such loan, mature in a period of eight years or more, the advance may be for an amount not in excess of 65 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of the advance exceed 60 per centum of the value of the real estate securing the home mortgage loan.

"(3) If secured by a home mortgage given in respect of any other home mortgage loan, the advance shall not be for an amount in excess of 50 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of such advance exceed 40 per centum of the value of the real estate securing the home mortgage loan."

Sec. 5 of An Act to Provide Additional Home-Mortgage Relief amended sec. 10 (a) of the Federal Home Loan Bank Act, as amended, to read as above set forth in the text.

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[12] As amended by sec. 6 of An Act to Provide Additional Home-Mortgage Relief. Secs. 10 (b) (1) and 10 (b) (2) of the Federal Home Loan Bank Act originally read as follows:

"(1) the home mortgage loan secured by it has more than fifteen years to run to maturity, or (2) the value of the real estate with respect to which the home mortgage is given exceeds $20,000, or . . ."

respect to which the home mortgage was given, as such real estate was appraised when the home mortgage was made.[13] For the purposes of this subsection and subsection (a) the value of real estate shall be as of the time the advance is made and shall be established by such certification by the borrowing institution, or such other evidence, as the board may require. For the purposes of this section, each Federal Home Loan Bank shall have power to make, or to cause or require to be made, such appraisals and other investigations as it may deem necessary. No home mortgage otherwise eligible to be accepted as collateral security for an advance by a Federal Home Loan Bank shall be accepted if any director, officer, employee, attorney, or agent of the Federal Home Loan Bank or of the borrowing institution is personally liable thereon, unless the board has specifically approved by formal resolution such acceptance.

(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. At no time shall the aggregate outstanding advances made by any Federal Home Loan Bank to any member exceed twelve times the amounts paid in by such member for outstanding capital stock held by it, or made to a nonmember borrower exceed twelve times the value of the security required to be deposited under section 6(e).

(d) The institution applying for an advance shall enter into a primary and unconditional obligation to pay off all advances, together with interest and any unpaid costs and expenses in connection therewith according to the terms under which they were made, in such form as shall meet the requirements of the bank and the approval of the board. The bank shall reserve the right to require at any time, when deemed necessary for its protection, deposits of ad-

[13] The first sentence of sec. 10 (b) of the Federal Home Loan Bank Act originally ended at the word "presented." Sec. 10 of An Act to Guarantee the Bonds of the Home Owners' Loan Corporation amended the first sentence of sec. 10 (b) of the Federal Home Loan Bank Act by adding at the end thereof the phrase above set forth in the text.

ditional collateral security or substitutions of security by the borrowing institution, and each borrowing institution shall assign additional or substituted security when and as so required. Subject to the approval of the board, any Federal Home Loan Bank shall have power to sell to any other Federal Home Loan Bank, with or without recourse, any advance made under the provisions of this Act, or to allow to such bank a participation therein, and any other Federal Home Loan Bank shall have power to purchase such advance or to accept a participation therein, together with an appropriate assignment of security therefor.

SEC. 10a.[14] Until July 1, 1936, each Federal Home Loan Bank is authorized to make advances to its members, in order to enable such members to finance home repairs, improvements, and alterations. Such advances shall not be subject to the provisions and restrictions of section 10 of this Act, but shall be made upon the security of notes representing obligations incurred pursuant to, and insurable under, section 2 of the National Housing Act. Advances made under the terms of this section shall be at such rates of interest and upon such terms and conditions as shall be determined by the Federal Home Loan Bank Board.

SEC. 10b.[15] Each Federal Home Loan Bank is authorized to make advances to nonmember mortgagees approved under title II of the National Housing Act. Such mortgagees must be chartered institutions having succession and subject to the inspection and supervision of some governmental agency, and whose principal activity in the mortgage field must consist of lending their own funds. Such advances shall not be subject to the other provisions and restrictions of this Act, but shall be made upon the security of insured mortgages, insured under title II of the National Housing Act. Advances made under the terms of this section shall be at such rates of interest and upon such terms and conditions as shall be determined by the Federal Home Loan Bank Board, but no advance may be for an amount in excess of 90 per centum of the unpaid principal of the mortgage loan given as security.

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[14] Sec. 10a was added by sec. 502 of the National Housing Act.
[15] Sec. 10b was added by sec. 7 of An Act to Provide Additional Home-Mortgage Relief.

SEC. 11. (a) Each Federal Home Loan Bank shall have power, subject to rules and regulations prescribed by the board to borrow and give security therefor and to pay interest thereon, to issue debentures, bonds, or other obligations upon such terms and conditions as the board may approve, and to do all things necessary for carrying out the provisions of this Act and all things incident thereto.

(b) The board may issue consolidated Federal Home Loan Bank debentures which shall be the joint and several obligations of all Federal Home Loan Banks organized and existing under this Act, in order to provide funds for any such bank or banks, and such debentures shall be issued upon such terms and conditions as the board may prescribe. No such debentures shall be issued at any time if any of the assets of any Federal Home Loan Bank are pledged to secure any debts or subject to any lien, and neither the board nor any Federal Home Loan Bank shall have power to pledge any of the assets of any Federal Home Loan Bank, or voluntarily to permit any lien to attach to the same while any of such debentures so issued are outstanding. The debentures issued under this section and outstanding shall at no time exceed five times the total paid-in capital of all the Federal Home Loan Banks as of the time of the issue of such debentures. It shall be the duty of the board not to issue debentures under this section in excess of the notes or obligations of member institutions held and secured under section 10(a) of this Act by all the Federal Home Loan Banks.

(c) At any time that no debentures are outstanding under this Act, or in order to refund all outstanding consolidated debentures issued under this section, the board may issue consolidated Federal Home Loan Bank bonds which shall be the joint and several obligations of all the Federal Home Loan Banks, and shall be secured and be issued upon such terms and conditions as the Board may prescribe.

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

(e) Each Federal Home Loan Bank shall have power to accept deposits made by members of such bank or by any other Federal Home Loan Bank or other instrumentality of the United States, upon such terms and conditions as the board may prescribe, but no Federal Home Loan Bank shall transact any banking or other business not authorized by this Act.

(f) The Board is authorized and empowered to permit, or whenever in the judgment of at least four members of the board an emergency exists requiring such action, to require, Federal Home Loan Banks, upon such terms and conditions as the board may prescribe, to rediscount the discounted notes of members held by other Federal Home Loan Banks, or to make loans to, or make deposits with, such other Federal Home Loan Banks, or to purchase any bonds or debentures issued under this section.

(g) Each Federal Home Loan Bank shall at all times have an amount equal to the sums paid in on outstanding capital subscriptions of its members, plus an amount equal to the current deposits received from its members, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers whose creditor liabilities (not including advances from the Federal Home Loan Bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe.

(h) Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in subsection (g)) as are not required for advances to members or nonmember borrowers, may be invested, to such extent as the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States and in such securities as fiduciary and trust funds may be invested in

under the laws of the State in which the Federal Home Loan Bank is located."[16]

INCORPORATION OF BANKS, AND CORPORATE POWERS

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the

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[16]As amended by Sec. 503 of the National Housing Act. Sec 11 of the Federal Home Loan Bank Act read originally as follows:

"SEC. 11. (a) Each Federal Home Loan Bank shall have power, subject to the approval of the board, (1) to borrow money, to give security therefor, and to pay interest thereon, and (2) to issue bonds and debentures having such maturities as may be determined by the board, secured by the transfer of eligible obligations of borrowing institutions on advances made by the bank to borrowing institutions and by the deposit of home mortgages.

"(b) The board shall prescribe rules and regulations governing the assignment, deposit, custody, substitution, and release of the obligations of borrowing institutions to the bank which are transferred and of the home mortgages securing such bonds and debentures, the forms and terms of such bonds and debentures, and the conditions under which they may be issued and retired, including any option with respect to payment and retirement thereof in advance of maturity, and such regulations shall provide for the deposit in trust, under such terms and conditions as it may deem advisable, of the home mortgages securing such bonds and debentures. For the purposes of this section the board is authorized to appoint, and fix the compensation and prescribe the duties of a registrar in each district, who shall not be connected with or interested in any Federal Home Loan Bank, any member, any nonmember borrower, or any institution of a class eligible to become a member or a nonmember borrower under this Act, and to require of such registrar a bond, in such amount and with such sureties as the board may fix, conditioned on the faithful performance of the duties required of him.

"(c) Such deposits in trust shall be so maintained that the aggregate unpaid principal of the home mortgage loans secured by the home mortgages deposited as security for bonds or debentures shall, as nearly as possible, be at all times not less than an amount equal to 190 per centum of the total outstanding amount of such issue. Cash deposited under authority of subsection (d) shall be security for an amount of bonds and debentures equal to the amount of cash deposited. Direct obligations of the United States deposited under authority of subsection (d) shall be security for an amount of bonds and debentures equal to the par value of such obligations.

"(d) The board may at any time require any Federal Home Loan Bank to deposit additional home mortgages or to make substitutions of home mortgages to secure such bonds and debentures, except that when in the opinion of the board home mortgages are not available for such purpose, it may permit, for such limited periods as it may deem advisable, the deposit of cash or direct obligations of the United States in lieu of the deposit of substitute or additional home loan mortgages.

"(e) The board shall approve or determine the rates of interest to be paid by the Federal Home Loan Banks upon the notes debentures, or bonds which they may issue except that no bond or debenture issued within seven years after the enactment of this Act shall bear a rate of interest in excess of 3½ per centum per annum, and no bond or debenture issued thereafter shall bear a rate of interest in excess of 5 per centum per annum, and shall provide such margins (not to exceed 1½

board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the ap-

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per centum) between interest rates received upon advances made to borrowing institutions and interest paid upon obligations which the Federal Home Loan Bank may issue as will cover expenses of operation and reserves and, under such regulations as may be provided by the board, some part of such reserve may be devoted to retirement of the stock subscribed by the United States.

"(f) The Federal Home Loan Banks shall be jointly and severally liable for the payment when due of all bonds and debentures, and of notes and other obligations issued by any Federal Home Loan Bank, and interest thereon, in accordance with their terms: *Provided*, That this shall not prevent any particular Federal Home Loan Bank, when specifically so authorized by the board, from borrowing funds temporarily under the terms of obligations which shall expressly state in substance in such manner as shall be approved by the board that the liability therefor is confined to the issuing bank. The Federal Home Loan Banks shall from time to time in accordance with rules, regulations, and orders of the board make adequate agreements and arrangements among themselves for meeting the payment of the bonds, debentures, notes, or other obligations on which they are jointly and severally liable, and the interest thereon, but such agreements and arrangements shall not restrict in any respect the joint and several liability herein established.

"(g) Each Federal Home Loan Bank shall have power to accept only such deposits as are made by members and nonmember borrowers of such bank, or by other Federal Home Loan Banks. Such deposits shall not be subject to check, and no rate of interest in excess of 2 per centum per annum shall be paid thereon. 'Deposits' as used in this section, does not include deposits made under section 6 (e). No Federal Home Loan Bank shall transact any banking or other business not expressly authorized by this Act. Bank shall transact any banking or other business not expressly authorized by this Act.

"(h) The board is authorized and empowered to permit, or, whenever in the judgment of at least four members of the board an emergency

proval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and by its board of directors, to prescribe, amend, and repeal by-laws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

EXEMPTION FROM TAXATION

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be ex-

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exists requiring such action, to require, Federal Home Loan Banks to rediscount the discounted notes of members or nonmember borrowers held by other Federal Home Loan Banks, or to purchase the bonds issued by any other Federal Home Loan Bank, or to make deposits with other Federal Home Loan Banks. In any case in which the board requires the purchase of bonds, the board shall fix the price therefor, or if the board requires the acceptance of a deposit, it shall fix the security therefor. The rediscount rates and the rates of interest to be paid upon deposits shall be fixed by the board.

"(i) Each Federal Home Loan Bank shall at all times have an amount, equal to the sums paid in on outstanding capital subscriptions of its members, plus an amount, equal to the current deposits received from its members and from nonmember borrowers, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with maturity not greater than one year made to members or nonmember borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with maturity not greater than one year made to members or nonmember borrowers the amount of whose creditor liabilities (not including advances from the Federal Home Loan Bank) does not exceed 5 per centum of such member's or nonmember borrower's net assets, which advances may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe.

"(j) Such part of the assets of each Federal Home Loan Bank (except reserves and except sums provided for in subsection (i) as such bank may deem available therefor, and as are not required for advances to members or nonmember borrowers, may be invested, subject to such regulations, restrictions, and limitations as may be prescribed by the board in direct obligations of the United States and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located."

empt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority."[17] The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any home-owner debtor of such bank.

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it.

SEC. 15. Obligations of the Federal Home Loan Banks issued with the approval of the board under this Act shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. The Federal reserve banks are authorized to act as depositaries, custodians, and/or fiscal agents for Federal Home Loan Banks in the general performance of their powers under

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[17] As amended by sec. 8 of An Act to Provide Additional Home-Mortgage Relief. The first sentence of sec. 13 of the Federal Home Loan Bank Act originally read as follows:

"Any and all notes, debentures, bonds or other such obligations issued by any bank shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority."

this Act. All obligations of Federal Home Loan Banks shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States.

RESERVES AND DIVIDENDS

SEC. 16. Each Federal Home Loan Bank shall carry to a reserve account semiannually 20 per centum of its net earnings until said reserve account shall show a credit balance equal to 100 per centum of the paid-in capital of such bank. After said reserve has reached 100 per centum of the paid-in capital of said bank, 5 per centum of its net earnings shall be added thereto semiannually. Whenever said reserve shall have been impaired below 100 per centum of the paid-in capital it shall be restored before any dividends are paid. Each Federal Home Loan Bank shall establish such additional reserves and/or make such charge-offs on account of depreciation or impairment of its assets as the board shall require from time to time. No dividends shall be paid except out of net earnings remaining after all reserves and charge-offs required under this Act have been provided for, and then only with the approval of the board. The reserves of each Federal Home Loan Bank shall be invested, subject to such regulations, restrictions, and limitations as may be prescribed by the board, in direct obligations of the United States and in such securities as fiduciary and trust funds may be invetsed in under the laws of the State in which the Federal Home Loan Bank is located.

FEDERAL HOME LOAN BANK BOARD

SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board," which shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years,

one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of $10,000 per annum: *Provided*, That during the fiscal year 1933 the salary shall be $9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank.

ADMINISTRATIVE EXPENSES

SEC. 18. (a) There is hereby authorized to be appropriated the sum of not to exceed $300,000 for salaries, travel and subsistence expenses, rents, printing and binding, furniture and equipment, law books, books of reference, periodicals, newspapers, maps, contract stenographic reporting services, telephone and telegraph services, and all other necessary expenses of the board, together with expenses preliminary to the organization and establishment of the banks created hereunder, until the end of the fiscal year 1933.

(b) The board shall have power to levy semiannually upon the Federal Home Loan Banks, and they shall pay, on

such equitable basis as the board shall determine, an assessment sufficient in its judgment to provide for the payment of its estimated expenses for the half year succeeding the levying of each such assessment, begining with the second half of the calendar year 1933. All expenses of the board incurred in carrying out the provisions of this Act, as determined by it, beginning July 1, 1933, shall be paid from the proceeds of such assessments, and if any deficiency shall occur in such fund at any time between such semiannual assessments the board shall have power to make an immediate assessment against the banks to cover such deficiency on the same basis as the original assessment. If any surplus shall remain from any assessment after the expiration of the semiannual period for which it was levied, such surplus may be deducted from the next following assessment.

SEC. 19. The board shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the performance of its duties under this Act without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, and agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided in the case of members of the board. The board shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government; and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid. The receipts of the Board derived from assessments upon the Federal Home Loan Banks and from other sources (except receipts from the sale of consolidated Federal Home Loan Bank bonds and debentures issued under section 11) shall be deposited in the Treasury of the United States, and may be from time to time withdrawn therefrom to defray the expenses of the Board, and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this Act, specific amendments thereof, and rules and regulations of the Board not inconsistent therewith.[18]

[18] This sentence was added by sec. 9 of An Act to Provide Additional Home-Mortgage Relief.

EXAMINATIONS AND REPORTS

SEC. 20. The board shall from time to time, at least twice annually, require examinations and reports of condition of all Federal Home Loan Banks in such form as the board shall prescribe and shall furnish periodically statements based upon the reports of the banks to the board. The board shall annually make a full report of its operations to the speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress. For the purposes of this Act, examiners appointed by the board shall be subject to the same requirements, responsibilities, and penalties as are applicable to examiners under the National Bank Act and the Federal Reserve Act, and shall have, in the exercise of functions under this Act, the same powers and privileges as are vested in such examiners by law.

UNLAWFUL ACTS, AND PENALTIES

SEC. 21. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of a Federal Home Loan Bank or the board upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal, deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

(b) Whoever (1) falsely makes, forges, or counterfeits any note, debenture, bond, or other obligation, or coupon, in imitation of or purporting to be a note, debenture, bond, or other obligation, or coupon, issued by a Federal Home Loan Bank; or (2) passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, debenture, bond, or other obligation, or coupon, purporting to have been issued by a Federal Home Loan Bank, knowing the same to be false, forged, or counterfeited; or (3) falsely alters any note, debenture, bond, or other obligation, or coupon, issued or purporting to have been issued by a Federal Home Loan Bank; or (4) passes, utters, or publishes, or attempts to pass, utter, or publish, as true

any falsely altered or spurious note, debenture, bond, or other obligation, or coupon, issued or purporting to have been issued by a Federal Home Loan Bank, knowing the same to be falsely altered or spurious, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(c) Whoever, being connected in any capacity with the board or a Federal Home Loan Bank, (1) embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, securities, or other things of value, whether belonging to it or pledged or otherwise intrusted to it; or (2) with intent to defraud the board or any Federal Home Loan Bank, or any other body politic or corporate, or any individual, or to deceive any officer, auditor, or examiners of the board or a Federal Home Loan Bank, makes any false entry in any book, report, or statement of or to the board or a Federal Home Loan Bank, or, without being duly authorized, draws any order or issues, puts forth, or assigns any note, debenture, bond, or other obligation, or draft, mortgage, judgment, or decree thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(d) It shall be unlawful for any individual, partnership, association, or corporation (1) which is not a Federal Home Loan Bank to use the words "Federal home loan bank," or a combination of the word "Federal" with any of such words, as a name or a part of a name under which he or it shall do business (except in the case of a name under which business is being done at the time of the enactment of this Act), or (2) which is not a Federal Home Loan Bank, to advertise or represent in any way that he or it is a Federal Home Loan Bank, or to publish or display any sign, symbol, or advertisement reasonably calculated to convey the impression that he or it is a Federal Home Loan Bank, or (3) which is not a member, to advertise or represent in any way that he or it is a member, or to publish or display any sign, symbol, or advertisement reasonably calculated to convey the impression that he or it is a member. Violations of this section shall be punishable by a fine of not exceeding $1,000 or by imprisonment of not exceeding one year, or both.

(e) The provisions of sections 112, 113, 114, 115, 116, and 117 of the Criminal Code of the United States (U. S. C., title 18, secs. 202 to 207, inclusive), in so far as applicable, are extended to apply to contracts or agreements of any Federal Home Loan Bank under this Act; which, for the purposes hereof, shall be held to include advances, loans, discounts, and purchase and repurchase agreements; extensions and renewals thereof; and acceptances, releases, and substitutions of security therefor.

MISCELLANEOUS

SEC. 22. (a) In order to enable the board to carry out the provisions of this Act, the Treasury Department, the Comptroller of the Currency, the Federal Reserve Board, and the Federal reserve banks are hereby authorized, under such conditions as they may prescribe, to make available to the board in confidence for its use and the use of any Federal Home Loan Bank such reports, records, or other information as may be available, relating to the condition of institutions with respect to which any such Federal Home Loan Bank has had or contemplates having transactions under this Act or relating to persons whose obligations are offered to or held by any Federal Home Loan Bank, and to make through their examiners or other employees, for the confidential use of the board or any Federal Home Loan Bank, examinations of such institutions.

(b) Every institution which shall apply for advances under this Act shall, as a condition precedent thereto, consent to such examination as the bank or the board may require for the purposes of this Act and/or that reports of examinations by constituted authorities may be furnished by such authorities to the bank or the board upon request therefor.

SEC. 23. In order that the Federal Home Loan Banks may be supplied with such forms of stock, debentures, and bonds as may be necessary under this Act, the Secretary of the Treasury is authorized to prepare such forms thereof as shall be suitable and approved by the board, which shall be held in the Treasury subject to delivery, upon order of the board. The engraved plates, dies, and bed pieces executed in connection therewith shall remain in the custody

of the Secretary of the Treasury. The board shall reimburse the Secretary of the Treasury for any expense incurred in the preparation, custody, and delivery of such stock, debentures, and bonds.

SEC. 24. (a) Any organization organized under the laws of any State and subject to inspection and regulation under the banking or similar laws of such State shall be eligible to become a member under this Act if—

(1) it is organized solely for the purpose of supplying credit to its members;

(2) its membership (A) is confined exclusively to building and loan associations, savings and loan associations, cooperative banks, and homestead associations; or (B) is confined exclusively to savings banks; and

(3) of the institutions to which its membership is confined which are organized within the State, its membership includes a majority of such institutions.

(b) In all respects, but subject to such additional rules and regulations as the board may provide, any such organization shall be a member for the purposes of this Act.

SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof in whole or in part.

SEC. 27. Any institution, except a national bank, trust company, or other banking organization organized under any law of the United States, including the laws relating to the District of Columbia, shall be authorized to subscribe for stock of a Federal Home Loan Bank if otherwise eligible to make such subscription under the terms of this

Act, any provision in any such law to the contrary notwithstanding.

SEC. 28. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 29. That notwithstanding any provisions of law prohibiting bonds of the United States from bearing the circulation privilege, for a period of three years from the date of enactment of this Act all outstanding bonds of the United States heretofore issued or issued during such period, bearing interest at a rate not exceeding 3⅜ per centum per annum, shall be receivable by the Treasurer of the United States as security for the issuance of circulating notes to national banking associations, and upon the deposit with the Treasurer of the United States by a national banking association of any such bonds, such association shall be entitled to receive circulating notes in the same manner and to the same extent and subject to the same conditions and limitations now provided by law in the case of 2 per centum gold bonds of the United States bearing the circulation privilege; except that the limitation contained in section 9 of the Act of July 12, 1882, as amended, with respect to the amount of lawful money which may be deposited with the Treasurer of the United States by national banking associations for the purpose of withdrawing bonds held as security for their circulating notes, shall not apply to the bonds of the United States to which the circulation privilege is extended by this section and which are held as security for such notes. Nothing contained in this section shall be construed to modify, amend, or repeal any law relating to bonds of the United States which now bear the circulation privilege.

As used in this section, the word "bonds" shall not include notes, certificates, or bills issued by the United States.

There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

SEC. 30. The right to alter, amend, or repeal this Act is hereby expressly reserved.

47 Stat. 725; 48 Stat. 128, 643, 1246; Public No. 76, 74th Cong., approved May 28, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 55

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET AL.,

Appellants,

vs.

PETER A. CLEARY, S. N. SCHAFER AND J. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. E. FINNEGAN,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 970

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., ET AL.,

Appellants,

vs.

PETER A. CLEARY, S. N. SCHAFER AND J. F. IRACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

(1) Motion to Dismiss Appeal or, in the Alternative,

(2) Motion to Affirm.

(3) Statement Disclosing Matter or Ground Making Against Jurisdiction of the Supreme Court Asserted by the Appellant.

(Rule 12 (3); 7 (3), (4) and (5).)

Filed May 16, 1935.

(1) The appellees move the Court to dismiss the appeal herein for the reason that said appeal does not pre-

sent any substantial Federal question, nor is the decision in this cause an appealable decision under Judicial Code, Section 237, as amended (Section 344, U. S. C. A., Title 28). Rule 12 (3); 7 (3), (4) and (5).

(2) In the event that said motion to dismiss said appeal be denied, then, in the alternative, appellees move the court to affirm the judgment herein for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 12 (3); 7 (3), (4) and (5).

In support of said motion and in opposition to the jurisdiction of this Court, appellees submit the following statement disclosing matter or ground making against the jurisdiction of this Court asserted by the appellants.

I.

Nature of Action and Ruling Below.

The relators-appellees constitute the Banking Commission of the State of Wisconsin, in which is vested the power to control and superintend Wisconsin building and loan associations. The defendants and appellants are a Wisconsin building and loan association and its officers and directors. In May, 1934, the defendant association attempted to convert itself into a Federal savings and loan association without the consent or authority and despite the protest of the Banking Commission of the State of Wisconsin.

This action was commenced in the Supreme Court of the State of Wisconsin to obtain a declaration that the attempted conversion was null, void and of no effect; that the association was still under the jurisdiction of the Banking Commission of the State of Wisconsin as provided by the statutes of this State; to compel the officers and di-

rectors to operate the association as a Wisconsin building and loan association or wind up its affairs as such association in the manner provided by the statutes of this State, and restraining and enjoining said association from operating said association as a Federal savings and loan association.

Two companion cases, *Reliance Building & Loan Association* v. *Peter A. Cleary et al.* and *Northern Building & Loan Association* v. *Peter A. Cleary et al.*, now pending in this Court, were heard in the Supreme Court of the State of Wisconsin at the same time and the opinion therein is entitled in the three causes. This opinion is reported in Volume 257 of the Northwestern Reporter at page 684.

The Supreme Court of the State of Wisconsin granted the Banking Commission the judgment which it prayed in the three cases. While the power of the Congress to create Federal savings and loan associations was challenged by the appellees, as were other provisions of the Home Owners' Loan Act of 1933, the State Supreme Court did not pass on the validity of this Federal legislation.

The precise question passed upon by the Wisconsin Supreme Court is "• • • the power of a building and loan association organized under and subject to the laws of the State of Wisconsin to convert itself into a savings and loan association under the Federal act." (Page 686 of Volume 257 of the Northwestern Reporter.)

The court first considered whether or not the State associations possess such power under the provisions of their charter or the laws of the State of Wisconsin. In concluding that the local association did not have this power, the court pointed out that these associations are not banks and do not have banking powers or privileges under the State laws; that their charters do not authorize them to divest themselves of the corporate powers conferred upon them by

the laws of the State; that though the Wisconsin Constitution (Sec. 1, Article II) vests in our legislature the reserve power to alter or repeal corporate charters, even that body could not alter or repeal the charter of a corporation so as to authorize any part of the stockholders to impose a new charter upon non-consenting stockholders of the corporation under the established law of the State of Wisconsin; that the purpose of the reserve power was to enable the State to retain control over its associations, and it would seem to follow that the legislature is without any authority to divest itself of this reserve power even in the absence of non-consenting members.

After concluding that the State of Wisconsin had not accorded its building and loan associations the privilege of transmutation or conferred this power upon them, the court then logically suggested the following two questions:

First. "Has Congress, by enactment of the Home Owners' Loan Act, attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation?

Second. "If it be found that it was the purpose of Congress by that act thus to increase respondents' corporate powers, then, has Congress the power to accomplish this result?"

In answer to the first question the court concluded that the Home Owners' Loan Act did not attempt to supersede the authority of the State and invest the respondents with the corporate power essential to a transmutation. It concluded that the State still has the right to charter corporations and retain control over them from the date of their beginning until dissolution. The court pointed out that the Act does not purport to invest the various State corporations with any new or different corporate powers. The

Act does no more than to afford consent to transmutation applicable to corporations having the power to transmute. In view of the interpretation of the Federal act adopted by our State Supreme Court, it deemed it unnecessary to consider the second question.

The provisions of the Federal act which appellants claim gives a State building and loan association the right to convert, despite any State law to the contrary, and which was interpreted by the Wisconsin Supreme Court, reads as follows:

> "Sec. 5. * * * (i) Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter."

II.

The Statutory Provisions Alleged to Sustain Jurisdiction are Inapplicable to This Case.

Under subdivision "A" of the appellants' Statement as to Jurisdiction, entitled "Statutory Provisions Sustaining Jurisdiction," appellants point to the provisions of the act of Congress approved February 13, 1925, chapter 229; 43 Stat. 936; U. S. C., Title 28, Sec. 344 (a), which amends subsection (a) of section 237 of the Judicial Code and which reads as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity

of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

By virtue of the statutory enactments cited in appellants' brief, the writ of error was abolished and the remedy of appeal substituted therefor. The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a. The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b.

There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the constitution, treaties, or laws of the United States.

The opinion of the Supreme Court of the State of Wisconsin, in this case, discussed, but did not determine any constitutional questions either State or Federal.

The State court held in substance, that conversion by a Wisconsin building and loan association into a corporation of another sovereign was contrary to the laws of the State of Wisconsin and that the Federal statute (Section 5 (i) of the Home Owners' Act of 1933), upon which the appellants rely, did not purport to authorize such conversion, contrary to the laws of the State under which the building and loan association was organized.

III.

The Validity of the Statutes of the United States, Provision of the Constitution of the State of Wisconsin and Statutes of the State of Wisconsin, Cited by Appellants, is not Involved in This Appeal.

Under subdivision "B" of the Statement as to Jurisdiction submitted by appellants are cited the provisions of

Section 5 of the Act of Congress approved June 13, 1933;

48 Stat. 128 at page 132, as amended by the Act of Congress approved April 27, 1934;

48 Stat. 643;

U. S. C. Supp., Title 12, Sec. 1464.

Section 1 of Article XI of the Constitution of the State of Wisconsin;

Provisions of Chapter 215 of the Wisconsin Statutes for the year 1933.

It is claimed that the validity of the foregoing statutes and provision of the Constitution of the State of Wisconsin are herein involved.

The appellants at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin.

The validity of the provisions of the Home Owners' Loan Act, and particularly of Section 5 (i) thereof, providing for conversion were challenged by the *appellees*, but the Supreme Court of the State of Wisconsin did not pass on its validity. It merely held that this section "does not attempt to invest the State corporations with any power not

granted to them by the State which created them. * * * It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. * * * It does not appear to be a supplanting of the requirements in the charter of a corporation" (page 689 of Vol. 257 of the Northwestern Reporter).

IV.

The Decision of the Supreme Court of the State of Wisconsin is Obviously Correct.

The only Federal right which the State corporation can possibly claim was denied by the decision of the Supreme Court of the State of Wisconsin is its alleged right to convert "into a Federal Savings and Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; * * *" as provided in Section 5 (i) of the Home Owners' Loan Act of 1933. The appellant bases its right to convert upon the foregoing quoted language.

It is clear that this language is permissive only. Its provisions merely set up the entrance requirements for a membership and do not purport to carry any powers to a State corporation contrary to the State law as was stated in the opinion of the Wisconsin Supreme Court, 257 N. W. 684, 689:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State

corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per-cent of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. Nor would a State statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things—first, it would enable a building and loan association to escape from regulatory control reserved by the State; and, second, it would divest stockholders of their rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. *Huber* v. *Martin, supra.*"

It is respectfully submitted that the decision sought to be reviewed is not appealable and that in any event no substantial Federal question is presented, and that therefore the appeal herein should be dismissed or the judgment should be affirmed.

Respectfully submitted,

J. E. FINNEGAN,
Attorney General,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Attorneys for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 571 56

RELIANCE BUILDING AND LOAN ASSOCIATION,
Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. E. FINNEGAN,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 971

RELIANCE BUILDING AND LOAN ASSOCIATION,
Appellant,

v.

PETER A. CLEARY, S. N. SCHAFER, AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,
Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

(1) Motion to Dismiss Appeal or, in the alternative,

(2) Motion to Affirm.

(3) Statement Disclosing Matter or Ground Making Against Jurisdiction of the Supreme Court Asserted by the Appellant.

(Rule 12 (3); 7 (3), (4) and (5).)

Filed May 16, 1935.

(1) The appellees move the Court to dismiss the appeal herein for the reason that said appeal does not present any

substantial Federal question, nor is the decision in this cause an appealable decision under Judicial Code, section 237, as amended (Section 344, U.S.C.A., Title 28). Rule 12 (3); 7 (3), (4) and (5).

(2) In the event that said motion to dismiss said appeal be denied, then in the alternative, appellees move the Court to affirm the judgment herein for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 12 (3); 7 (3), (4) and (5).

In support of said motion and in opposition to the jurisdiction of this Court, appellees submit the following statement disclosing matter or ground making against the jurisdiction of this Court asserted by the appellants.

I.

Nature of Action and Ruling Below.

The appellees constitute the Banking Commission of the State of Wisconsin in which is vested the power to control and superintend Wisconsin building and loan associations. The appellant is a Wisconsin building and loan association.

The appellant commenced this action in the Circuit Court of Milwaukee County, Wisconsin, seeking to restrain the Banking Commission from interfering with its plan to convert itself into a Federal savings and loan association. The Banking Commission counterclaimed, asking a declaration that it have full power and authority to take possession of the appellant association under the laws of the State of Wisconsin and for an injunctional order restraining the appellant from so converting.

Two companion cases *State ex rel Peter A. Cleary, et al.* v. *Hopkins Street Bldg. & Loan Ass'n, a Wis. Corporation, et al.*, and *Northern Bldg. & Loan Ass'n., a Corporation* vs.

Peter A. Cleary et al., as Banking Commission, et al., now pending in this Court, were heard in the Supreme Court of the State of Wisconsin at the same time and the opinion therein is entitled in the three causes. This opinion is reported in Volume 257 of the Northwestern Reporter at page 684.

The Supreme Court of the State of Wisconsin granted the Banking Commission the judgment which it prayed in the three cases. While the power of the Congress to create Federal savings and loan associations was challenged by the appellees, as were other provisions of the Home Owners' Loan Act of 1933, the State Supreme Court did not pass on the validity of this Federal legislation.

The precise question passed upon by the Wisconsin Supreme Court is "• • • the power of a building and loan association organized under and subject to the laws of the State of Wisconsin to convert itself into a savings and loan association under the Federal act." Page 686 of Vol. 257 of Northwestern Reporter.

The court first considered whether or not the State associations possess such power under the provisions of their charter or the laws of the State of Wisconsin. In concluding that the local association did not have this power, the court pointed out that these associations are not banks and do not have banking powers or privileges under the State laws; that their charters do not authorize them to divest themselves of the corporate powers conferred upon them by the laws of the State; that though the Wisconsin Constitution (Sec. 1, Article II) vests in our legislature the reserve power to alter or repeal corporate charters, even that body could not alter or repeal the charter of a corporation so as to authorize any part of the stockholders to impose a new charter upon non-consenting stockholders of the corporation under the established law of the State of Wisconsin; that the purpose of the reserve power was to enable the

State to retain control over its associations and it would seem to follow that the legislature is without any authority to divest itself of this reserve power even in the absence of non-consenting members.

After concluding that the State of Wisconsin had not accorded its building and loan associations the privilege of transmutation or conferred this power upon them, the court then logically suggested the following two questions:

> "First, Has Congress, by enactment of the Home Owners' Loan Act, attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation?
>
> "Second, If it be found that it was the purpose of Congress by that act thus to increase respondents' corporate powers, then, has Congress the power to accomplish this result?"

In answer to the first question the court concluded that the Home Owners' Loan Act did not attempt to supersede the authority of the State and invest the respondents with the corporate power essential to a transmutation. It concluded that the State still has the right to charter corporations and retain control over them from the date of their beginning until dissolution. The court pointed out that the act does not purport to invest the various State corporations with any new or different corporate powers. The act does no more than afford consent to transmutation applicable to corporations having the power to transmute. In view of the interpretation of the Federal act adopted by our State Supreme Court, it deemed it unnecessary to consider the second question.

The provisions of the Federal act which appellants claim gives a State building and loan association right to convert, despite any State law to the contrary, and which was interpreted by the Wisconsin Supreme Court reads as follows:

"Sec. 5. * * * (i) Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter."

II.

The Statutory Provisions Alleged to Sustain Jurisdiction Are Inapplicable to This Case.

Under Subdivision "A" of the appellants' Statement as to Jurisdiction entitled "Statutory Provisions Sustaining Jurisdiction," appellants point to the provisions of the Act of Congress approved February 13, 1925, Chapter 229, 43 Stat. 936; U. S. C., Title 28, Sec. 344 (a), which amends subsection (a) of Sec. 237 of the Judicial Code and which reads as follows:

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

By virtue of the statutory enactments cited in appellants' brief, the writ of error was abolished and the remedy of appeal substituted therefor. The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a. The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., title 28, Sec. 861b.

There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

The opinion of the Supreme Court of the State of Wisconsin in this case discussed, but did not determine, any constitutional questions either State or Federal.

The State court held, in substance, that conversion by a Wisconsin building and loan association into a corporation of another sovereign was contrary to the laws of the State of Wisconsin and that the Federal statute, Sec. 5 (i) of the Home Owners' Loan Act of 1933, upon which the appellants rely, did not purport to authorize such conversion, contrary to the laws of the State under which the building and loan association was organized.

III.

The Validity of the Statutes of the United States, Provision of the Constitution of the State of Wisconsin and Statutes of the State of Wisconsin, Cited by Appellants, is not Involved in This Appeal.

Under subdivision "b" of the Statement as to Jurisdiction submitted by appellants are cited the provisions of

Section 5 of the Act of Congress approved June 13, 1933;

48 Stat. 128 at page 132, as amended by the Act of Congress approved April 27, 1934;

48 Stat. 643;
U. S. C. Supp. Title 12, Sec. 1464;
Section 1 of Article XI of the Constitution of the State of Wisconsin;
Provisions of Chapter 215 of the Wisconsin Statutes for the year 1933.

It is claimed that the validity of the foregoing statutes and provision of the Constitution of the State of Wisconsin are herein involved.

The appellants at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin.

The validity of the provisions of the Home Owners' Loan Act, and particularly of Section 5 (i) thereof, providing for conversion, were challenged by the appellees, but the Supreme Court of the State of Wisconsin did not pass on its validity. It merely held that this section "does not attempt to invest the State corporations with any power not granted to them by the State which created them. • • • It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. • • • It does not appear to be a supplanting of the requirements in the charter of a corporation" (Page 689 of Vol. 257 of the Northwestern Reporter).

IV.

The Decision of the Supreme Court of the State of Wisconsin is Obviously Correct.

The only Federal right which the State corporation can possibly claim was denied by the decision of the Supreme Court of the State of Wisconsin is its alleged right to convert "into a Federal Savings and Loan Association under

this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; * * *" as provided in Section 5 (i) of the Home Owners' Loan Act of 1933. The appellant bases its right to convert upon the foregoing quoted language.

It is clear that this language is permissive only. Its provisions merely set up the entrance requirements for a membership and do not purport to carry any powers to a State corporation contrary to the State law, as was stated in the opinion of the Wisconsin Supreme Court, 257 N. W. 684, 689:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per cent of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. Nor would a State statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal government requires to a transmutation. The

opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things—first, it would enable a building and loan association to escape from regulatory control reserved by the State; and, second, it would divest stockholders of their rights in the corporation under State law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. *Huber* v. *Martin, supra.*"

It is respectfully submitted that the decision sought to be reviewed is not appealable and that in any event no substantial Federal question is presented and that therefore the appeal herein should be dismissed or the judgment should be affirmed.

Respectfully submitted,

J. E. FINNEGAN,
Attorney General,
BENJAMIN POSS,
JOSEPH P. BRADY,
Attorneys for Appellees.

(6370-C)

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972 57

NORTHERN BUILDING AND LOAN ASSOCIATION,
Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. E. FINNEGAN,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

(1) Motion to Dismiss Appeal or, in the alternative.

(2) Motion to Affirm.

(3) Statement Disclosing Matter or Ground Making Against Jurisdiction of the Supreme Court Asserted by the Appellant.

(Rule 12 (3); 7 (3), (4) and (5).)

Filed May 16, 1935.

(1) The appellees move the court to dismiss the appeal herein for the reason that said appeal does not present

any substantial Federal question, nor is the decision in this cause an appealable decision under Judicial Code, Section 237, as amended (Section 344, U. S. C. A., Title 28). Rule 12 (3); 7 (3), (4) and (5).

(2) In the event that said motion to dismiss said appeal be denied, then in the alternative, appellees move the Court to affirm the judgment herein for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 12 (3); 7 (3), (4) and (5).

In support of said motion and in opposition to the jurisdiction of this Court, appellees submit the following statement disclosing matter or ground making against the jurisdiction of this Court asserted by the appellants.

I.

Nature of Action and Ruling Below.

The appellees constitute the Banking Commission of the State of Wisconsin in which is vested the power to control and superintend Wisconsin building and loan associations. The appellant is a Wisconsin building and loan association. The appellant commenced this action in the Circuit Court of Milwaukee County, Wisconsin, seeking to restrain the Banking Commission from interfering with its plan to convert itself into a Federal savings and loan association. The Banking Commission counterclaimed asking a declaration that it have full power and authority to take possession of the appellant association under the laws of the State of Wisconsin and for an injunctional order restraining the appellant from so converting.

Two companion cases *State ex rel. Peter A. Cleary et al. v. Hopkins Street Bldg. & Loan Ass'n, a Wisconsin Corporation, et al.* and *Reliance Bldg. & Loan Ass'n, a*

Corporation, v. *Peter A. Cleary et al., as Banking Commission et al.*, now pending in this Court, were heard in the Supreme Court of the State of Wisconsin at the same time and the opinion therein is entitled in the three causes. This opinion is reported in Vol. 257 of the Northwestern Reporter at page 684.

The Supreme Court of the State of Wisconsin granted the Banking Commission the judgment which it prayed in the three cases. While the power of the Congress to create Federal savings and loan associations was challenged by the appellees, as were other provisions of the Home Owners' Loan Act of 1933, the State Supreme Court did not pass on the validity of this Federal legislation.

The precise question passed upon by the Wisconsin Supreme Court is "• • • the power of a building and loan association organized under and subject to the laws of the State of Wisconsin to convert itself into a savings and loan association under the Federal act." Page 686 of Vol. 257 of Northwestern Reporter.

The court first considered whether or not the State associations possess such power under the provisions of their charter or the laws of the State of Wisconsin. In concluding that the local association did not have this power, the court pointed out that these associations are not banks and do not have banking powers or privileges under the State laws; that their charters do not authorize them to divest themselves of the corporate powers conferred upon them by the laws of the State; that though the Wisconsin Constitution (Sec. 1, Article II) vests in our legislature the reserve power to alter or repeal corporate charters, even that body could not alter or repeal the charter of a corporation so as to authorize any part of the stockholders to impose a new charter upon non-consenting stockholders of the corporation under the estab-

lished law of the State of Wisconsin; that the purpose of the reserve power was to enable the State to retain control over its associations and it would seem to follow that the legislature is without any authority to divest itself of this reserve power even in the absence of non-consenting members.

After concluding that the State of Wisconsin had not accorded its building and loan associations the privilege of transmutation or conferred this power upon them, the court then logically suggested the following two questions:

> "First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation?
>
> "Second, If it be found that it was the purpose of Congress by that act thus to increase respondents' corporate powers, then, has Congress the power to accomplish this result?"

In answer to the first question the court concluded that the Home Owners' Loan Act did not attempt to supersede the authority of the State and invest the respondents with the corporate power essential to a transmutation. It concluded that the State still has the right to charter corporations and retain control over them from the date of their beginning until dissolution. The court pointed out that the act does not purport to invest the various State corporations with any new or different corporate powers. The act does no more than to afford consent to transmutation applicable to corporations having the power to transmute. In view of the interpretation of the Federal act adopted by our State Supreme Court, it deemed it unnecessary to consider the second question.

The provisions of the Federal act which appellants claim gives a State building and loan association right to convert,

despite any State law to the contrary, and which was interpreted by the Wisconsin Supreme Court, reads as follows:

> "Sec. 5. * * * (i) Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter."

II.

The Statutory Provisions Alleged to Sustain Jurisdiction are Inapplicable to This Case.

Under Subdivision "A" of the appellants' Statement as to Jurisdiction entitled "Statutory Provisions Sustaining Jurisdiction," appellants point to the provisions of the Act of Congress approved February 13, 1925, Chapter 229, 43 Stat. 936; U. S. C. Title 28, Sec. 344 (a), which amends subsection (a) of Sec. 237 of the Judicial Code, and which reads as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its

discretion, award execution or remand the cause to the court from which it was removed by the writ."

By virtue of the statutory enactments cited in appellants' brief, the writ of error was abolished and the remedy of appeal substituted therefor. The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a. The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b.

There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

The opinion of the Supreme Court of the State of Wisconsin in this case discussed, but did not determine any constitutional questions, either State or Federal.

The State court held, in substance, that conversion by a Wisconsin building and loan association into a corporation of another sovereign was contrary to the laws of the State of Wisconsin and that the Federal statute, Sec. 5 (i) of the Home Owners' Loan Act of 1933, upon which the appellants rely, did not purport to authorize such conversion, contrary to the laws of the State under which the building and loan association was organized.

III.

The Validity of the Statutes of the United States, Provision of the Constitution of the State of Wisconsin and Statutes of the State of Wisconsin, Cited by Appellants, is not Involved in This Appeal.

Under subdivision "b" of the Statement as to Jurisdiction submitted by appellants, are cited the provisions of

Section 5 of the Act of Congress approved June 13, 1933;

48 Stat. 128 at page 132, as amended by the Act of Congress approved April 27, 1934;
48 Stat. 643;
U. S. C. Supp., Title 12, Sec. 1464;
Section 1 of Article XI of the Constitution of the State of Wisconsin;
Provisions of Chapter 215 of the Wisconsin Statutes for the year 1933.

It is claimed that the validity of the foregoing statutes and provision of the Constitution of the State of Wisconsin are herein involved.

The appellants at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin.

The validity of the provisions of the Home Owners' Loan Act, and particularly of Section 5 (i) thereof, providing for conversion were challenged by the *appellees*, but the Supreme Court of the State of Wisconsin did not pass on its validity. It merely held that this section "does not attempt to invest the State corporations with any power not granted to them by the State which created them. * * * It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. * * * It does not appear to be a supplanting of the requirements in the charter of a corporation" (page 689 of Vol. 257 of the Northwestern Reporter).

IV.

The Decision of the Supreme Court of the State of Wisconsin is Obviously Correct.

The only Federal right which the State corporation can possibly claim was denied by the decision of the Supreme Court of the State of Wisconsin is its alleged right to con-

vert "into a Federal Savings and Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; * * *" as provided in Section 5 (i) of the Home Owners' Loan Act of 1933. The appellant bases its right to convert upon the foregoing quoted language.

It is clear that this language is permissive only. Its provisions merely set up the entrance requirements for a membership and do not purport to carry any powers to a State corporation contrary to the State law, as was stated in the opinion of the Wisconsin Court, 257 N. W. 684, 689:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. Nor would a State statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal

government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things—first, it would enable a building and loan association to escape from regulatory control reserved by the State; and, second, it would divest stockholders of their rights in the corporation under the State law, and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. *Huber* v. *Martin, supra.*"

It is respectfully submitted that the decision sought to be reviewed is not appealable and that in any event no substantial Federal question is presented, and that therefore the appeal herein should be dismissed or the judgment should be affirmed.

Respectfully submitted,

J. E. FINNEGAN,
Attorney General,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Attorneys for Appellees.

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FILED

In the Supreme Court of the United States

October Term, 1935.

The Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
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No. 55.

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION OF MILWAUKEE, et al,
Petitioners,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, Constituting The Banking Commission of the Banking Department of the State of Wisconsin,
Respondents.

No. 56.

RELIANCE BUILDING AND LOAN ASSOCIATION, a corporation,
Petitioner,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, as The Banking Commission of the Banking Department of the State of Wisconsin, et al,
Respondents.

No. 57.

NORTHERN BUILDING AND LOAN ASSOCIATION, a corporation,
Petitioner,

vs.

PETER A. CLEARY, S. N. SCHAFER and H. F. IBACH, as The Banking Commission of the Banking Department of the State of Wisconsin, et al,
Respondents.

On Writs of Certiorari to the Supreme Court of the State of Wisconsin.

RESPONDENTS' BRIEF.

J. E. FINNEGAN,
Attorney General.
BENJAMIN POSS,
JOSEPH P. BRAZY,
Special Counsel.
Attorneys for Respondents.

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In the Supreme Court of the United States

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Respondents.

RESPONDENTS' BRIEF.

These actions are before the Court on Writs of Certiorari to the Supreme Court of the State of Wisconsin granted June 3, 1935, upon dismissal of Petitioners' appeals, to review the judgments entered in the State court on December 11, 1934. The actions were there consolidated for argument, and the single opinion of the State court is reported in Volume 257 N. W. at page 684 under the titles: *State ex rel. Cleary et al. vs. Hopkins Street Building & Loan Ass'n. et al; Reliance Building & Loan Ass'n. vs. Cleary et al; Northern Building & Loan Ass'n vs. Same.* Motions for rehearing made by the Petitioners above named were denied by the State Supreme Court on February 5, 1935.

NATURE OF ACTIONS.

These actions all grow out of the attempts by the building and loan associations named in the caption, corporations organized by virtue of the laws of the State of Wisconsin, to convert themselves into Federal corporations in spite of the law of the State. These associations contend that they are given the power to convert by a Federal enactment (Section 5 (i) of the Home Owner's Loan Act of 1933, as amended, printed at pages 64, 65 of Petitioner's brief) to which the laws of the State must yield.

The Respondents are the members of the Banking Commission of the State of Wisconsin, to which has been given superintending powers and duties over Wisconsin building and loan associations. The Commission is given full power to take possession of a State building and loan association when the association attempts to violate its charter or any of the laws of the State.

Reliance Building and Loan Association and Northern Building and Loan Association brought separate actions in the Circuit Court of Milwaukee County, Wisconsin to restrain the Commission from interfering with or attempting to prevent their proposed conversion. The Commission counterclaimed in these two actions seeking to prevent the conversion and to compel the associations to remain State associations. The associations prevailed in the trial court, but on appeal to the Supreme Court of the State, the judgments were reversed, and judgment ordered in favor of the Commission upon its counterclaims.

The Commission actually took possession of Hopkins Street Building and Loan Association, to prevent its attempted conversion, but that Association obtained a temporary order from the Circuit Court of Milwaukee County, Wisconsin requiring the Commission to give up possession, and under the protection of this temporary order immediately accepted a charter from the Federal Government. Thereupon, an original action was prosecuted in the Supreme Court of the State of Wisconsin by the State on relation of the Commission against this association to declare the attempted conversion to be null and void and to compel the Association to operate as a State corporation. The Commission prevailed in this action.

ISSUES.

The ultimate question in all of these causes is the *power* of a Wisconsin building and loan association to convert itself into a Federal corporation.

The State has not given this power to its associations. Its laws require these associations to remain State corporations under its sole and exclusive jurisdiction from the moment of their creation until their legal death after liquidation in the manner provided by State law.

Petitioners claim that they are given this power to transfer from one sovereign to another sovereign by virtue of an act of the Federal Congress (Section 5 (i) of the Home Owner's Loan Act of 1933 as amended) and the Federal Government has jurisdiction to confer this power notwithstanding the law of the State.

Respondents deny that the Federal Act should be so construed and claim that the Act is unconstitutional if so construed on the ground that the Federal Government is without power to modify or abridge the charter contract between the State and its corporations or to nullify valid State legislation regulating the operation of the corporate instrumentalities of the State.

Respondents further contend that the Federal Government is without power to incorporate these "local mutual thrift institutions" of the building and loan type to provide for the financing of homes. Respondents contend that this is not a function of the Federal Government and hence it cannot lawfully take over Wisconsin corporations organized for this purpose.

Respondents further contend that even assuming that the Federal Government has the power to create these corporations the Congress has improperly delegated this power to the Federal Home Loan Bank Board.

NATURE OF THE ASSOCIATIONS INVOLVED.

The State of Wisconsin in the proper exercise of its powers as a sovereign has for years chartered local mutual associations, known as building and loan associations, to foster and encourage home building and home ownership in the State. These corporations are truly agencies or instrumentalities of the State for carrying out this policy. The State has always guarded them jealously because of their

public character, and has dictated their every move to the end that they might safely carry out the public purpose for which they were organized. The State has also given them privileges and immunities not given to other corporations to the same end.

The nature and character of these associations and their intimate relationship to the State is shown in *Chapter 215 of the Wisconsin Statutes of 1933*, entitled "Building and Loan Associations." Space does not permit setting forth all of the pertinent sections of this chapter, but some of them may be summarized briefly as follows:

The object and purpose of a Wisconsin building and loan association is "raising money to be loaned among its members" *(Sec. 215.01* Wis. Stats.). They are not organized as places of safekeeping for money or the investment of money. They do not exercise any banking powers or privileges. They gather money from their members, through the sale of their stock, and can lend *only* to their members *(215.01, 215.15* Wis. Stats.). The evidence of indebtedness taken from borrowers is required to be non-negotiable *(Sec. 215.15* Wis. Stats.). Only natural persons can become members of a Wisconsin building and loan association, and the amount of stock that may be held therein by any person is limited by statute *(Sec. 215.20* Wis. Stats.).

They sell stock to non-borrowing members to serve as a means of making loans to those of its members who need loans. The right to issue paid-up stock is carefully limited by statute to serve as a means for making loans to the members *(Sec. 215.08* Wis. Stats.).

The building up of large reserves is contrary to our building and loan scheme of operation. Except for the amount of money needed to maintain a relatively small contingent fund *(Sec. 215.24* Wis. Stats.) all of the profits accruing as a result of its operation must be promptly dis-

tributed among the members, so that the borrowers may be enabled to pay up their mortgaged indebtedness as rapidly as possible.

No group has an absolute right to organize a building and loan association. The State, through the Respondents, exercises discretionary power in the granting of charters to such associations *(Sec. 215.01 (4)* and *Sec. 215.03* Wis. Stats.), after investigation and a public hearing *(Sec. 215.01 (4)* Wis. Stats.). The State prescribes the rules and regulations for the conduct of the business of these associations *(Sec. 215.01 (13)* Wis. Stats.). Approval must be obtained of the by-laws of the association *(Sec. 215.02* Wis. Stats.). The size of the association is also regulated by the State *(Sec. 215.05* and *Sec. 215.08* Wis. Stats.) as is the number and location of its offices *(Sec. 215.06* and *Sec. 215.01 (9)* and *(10)* Wis. Stats.). Its powers are limited and prescribed by statute *(Sec. 215.07* Wis. Stats.). Even the operating expenses of an association are limited by the State *(Sec. 215.25* Wis. Stats.).

An association may not be organized and then fail to engage in the business for which it was organized. If it fails to commence business within one year, it ceases to exist and the charter is rendered null and void *(Sec. 215.02* Wis. Stats.).

If an association desires to cease doing business, it may do so upon a vote of two-thirds of its outstanding capital stock, but the State, through Respondents, still retains control of the association throughout liquidation, until all of its shareholders are paid their interest in the association, and the association legally dissolved *(Sec. 215.36* and *Sec. 215.365* Wis. Stats.).

To improve the service rendered by the building and loan associations to the State, our legislature has recently established a "Building and Loan Advisory Committee" to

advise with the Respondents and others "in respect to improvement in the condition and service of building and loan associations in this State" *(Sec. 215.48* Wis. Stats.). Our legislature has also authorized the creation of the Building and Loan Finance Corporation, a State instrumentality, to aid the State associations *(Sec. 215.50* Wis. Stats.). Our legislature has also passed an enabling act to permit the organization of the Wisconsin Building and Loan Guarantee Corporation by the Secretary of State, the State Treasurer and the State associations to guarantee and protect the investments of stockholders in our associations. The Secretary of State and the State Treasurer are, among others, made directors of the corporation *(Chapter 270, Laws of Wisconsin, 1935)*.

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ARGUMENT.

I.

The Wisconsin Supreme Court properly held that Section 5 (i) of the Home Owners' Loan Act of 1933 provides Federal consent to conversion of state building and loan associations permitted to convert under the charters given them by the State.

Section 5 (i) is plainly open to this construction. It reads as follows:

"Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this

section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

The term "member" means any institution which has subscribed for stock in a Federal Home Loan Bank (Sec. 2, (4) Federal Home Loan Bank Act, printed at page 67 of Petitioners' Brief). Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank, is eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank *whether organized under the laws of a state* or of the United States if it, among other conditions, makes long term home mortgage loans (Sec. 4 (a) of Federal Home Loan Bank Act, printed at page 69 of Petitioners' Brief).

The Act does not purport to invest a state corporation which purchases stock in a Federal Home Loan Bank and thus becomes a member thereof with powers at variance with those given it by its charter. It does not appear in this act that there is an intention to supersede valid legislation of a state which defines the powers of its corporations, regulates and controls the manner in which they may operate and the conditions upon which they may cease operating as state corporations.

These conclusions were stated by the Wisconsin Supreme Court as follows:

"As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the state's right to charter corporations and retain control over them under the state constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as state corporations. Nor does that act attempt to

invest the state corporations with any power not granted to them by the state which created them. The act was intended to be administered in forty-eight states, and applies to corporations operating under different degrees of state control and with different powers. It does not purport to invest the various state corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. If a state, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a federal corporation upon a vote of 51 per centum of the stockholders. Nor would a state statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the federal act may readily be interpreted as the manner of consenting by the membership which the federal government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. * * *" (R. Cause No. 55, p. 61).

In other words the Federal Government has by this section set up its entrance requirements to those state corporations having the power to convert.

Section 5 (i) as originally enacted provided that conversion could be effected by a corporation "*upon a vote of its stockholders as provided by the law under which it op-*

erates." The amended provision substituted for the quoted clause reads: "*upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action.*"

Petitioners concede that under the original enactment conversion could not be effected if the law of the state under which the corporation was organized did not permit it (page 22 of Petitioners' Brief). It is then argued that the amendment of this section shows an intention by Congress to disregard state law on the subject.

If the original Act expressly required state legislation and the amendment struck such requirement from the Act, there would be great force in this contention. However, it will be noted that the original Act is just as silent on the subject of valid state legislation preventing conversion as the amended Act.

The former provision related to the number of votes necessary to effect conversion and made this vote entirely dependent upon the law of the state. The amended provision also relates to the number of votes necessary to effect conversion and establishes a minimum of 51 per centum required by the Federal Government.

If Section 5 (i) was amended by Congress for the purpose of clearly and definitely vitiating state law preventing conversion or eliminating the necessity of state consent, as Petitioners urge, the Congress would have said so in no uncertain terms. If such were the purpose of the amendment, the Congress would have added to the amendment language substantially as follows: "anything in the laws of a state to the contrary notwithstanding,"—or "no state legislation shall be necessary for conversion."

Petitioners further argue that the "Congress refused or failed to require that conversion shall not contravene State laws." From this it is concluded that Congress by

the amendment of Section 5 (i) intended to nullify these state laws. This argument is just as applicable to the original Act as to the amended Act; both are silent on the subject of contravening state laws. It seems to us that the presumption should be the other way. Assuming for the sake of argument that Congress has the power, an intention to override the law of the state by congressional enactment should not be presumed without clear language expressing such intention.

Petitioners rely upon *Casey vs. Galli*, 94 U. S. 673, to support its construction of Section 5 (i). This case will be discussed in the portion of our argument relating to the power of Congress to authorize conversion in contravention of state law, but we wish to point out at this point that the Federal statute involved in that case used language substantially different than the language found in Section 5 (i). It was not the National Bank Act as codified in 1874 that was before the Supreme Court in that case as Petitioners erroneously stated at page 26 of their brief but Section 44 of the National Bank Act as originally enacted on June 3, 1864, which reads as follows:

> "Sec. 44. *And be it further enacted*, that any bank incorporated by special law, or any banking institution organized under a general law of any state, may, *by authority of this act*, become a national association *under its provisions*, by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking in-

stitution into a national association under this act'' (Italics ours).

In discussing the difference between the statute hereinabove quoted and Section 5 (i), the Wisconsin Supreme Court made the following comment:

"* * * It ought also to be said that aside from the fact that the Home Owners' Loan Act does not deal with the general subject of banking, as did the law involved in the Galli case, it is otherwise quite different from the statute there involved and construed. That act authorized state banks to become national banks. 13 U. S. Stats. at Large, 112, 113, provided 'that any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national association under its provisions. * * *' It is specifically provided that 'the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to charge and convert the said bank or banking institution into a national association under this act.' A majority of the directors are thereafter specifically given the power to execute all necessary papers essential to a perfection of the organization as a national association. This act constituted an unmistakable investiture of corporate powers upon state banks. * * *'' (R. Cause 55, pp. 62 and 63).

In view of the difference of language between the two sections the italicized words in the clause in the following quotation from Section 5 (i):

> "Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association *under this Act* upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; • • •"

should be construed to modify the words "Federal Savings and Loan Association" and not the word "convert." The "51 per centum" of the "votes cast at a legal meeting" should be construed as a limitation in the event that the state enabling act purported to authorize conversion upon a lesser vote. We submit that the use of the term "*legal* meeting" is significant. A *legal* meeting to consider conversion cannot be held by a state building and loan association unless the state authorizes the proposed conversion.

In closing its discussion of the proper construction to be given the Section 5 (i) the Wisconsin Supreme Court states:

> "• • • If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or definition of the conditions under which transmutation will be permitted, so far as the federal government is concerned, without purporting to increase corporate powers of state corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction • • •" (R. Cause 55, p. 63).

The policy of this Court requires that so far as statutes fairly may be construed as to avoid doubtful constitutional questions, they should be so construed.

Crowell vs. Benson, 285 U. S. 22.
Fox vs. Washington, 236 U. S. 273.

We shall next show that Petitioners' construction of Section 5 (i) clearly places this enactment beyond the powers given to Congress by the Federal Constitution.

II.

As construed by petitioners, Section 5(i) of the Home Owners' Loan Act of 1933 is clearly beyond the powers given to the Congress by the Federal Constitution.

Assuming for the sake of argument that the Federal Government has the power to provide for the financing of homes and to that end may create local mutual associations, it cannot be contended that the Federal Government has exclusive jurisdiction over this subject matter. Nor is it like the subject of bankruptcy over which Congress has been given the power to establish uniform laws and hence has exclusive jurisdiction upon the passage of such laws which supersede prior state legislation.

No one can seriously question the power of the state as a sovereign to create corporate instrumentalities to promote home building and home ownership for the general welfare of its citizens. This function has never been surrendered either expressly or by implication to the Federal Government.

Possessing the sovereign power to create these corporations, the state may endow them with such powers as it

deems appropriate. It may impose such conditions upon the right to incorporate as it sees fit and by accepting a charter from the state the corporation must accept the conditions. As was stated in *Home Ins. Co. of New York vs. People of the State of New York,* 134 U. S. 594, 600:

> "The granting of such right or privilege rests entirely in the discretion of the State, and of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interest and policy."

Pursuant to this power the State of Wisconsin has created its building and loan associations as its instrumentalities to carry out its policy in respect of home building and home ownership and by statute has carefully prescribed the conditions and restrictions governing their operation.

Wisconsin has not given its associations the power to convert. They must by State command operate under the jurisdiction of the State and subject to the control of the State from the moment they are organized until their death after liquidation in the manner provided by Wisconsin Statutes.

It is submitted that the State has the sole right to grant powers to its corporate instrumentalities or withhold powers from them. A corporation obtains all of its powers from the same source that it does its existence, i. e., the State. If the State wishes to create corporations which have no power to convert, or to engage in interstate commerce, or to hold real estate, or to do one hundred other things which the State desires shall not be done, the State may enforce its wishes by withholding these powers in the grant of the privilege of incorporation. This has always been the settled law in Wisconsin.

The Janesville Bridge Co. vs. Stoughton, 1 Pinney's Wis. Rep. 667, 672.

Kappers vs. Cast Stone Construction Co., 184 Wis. 627, 200 N. W. 376.

Fleischer vs. Pelton Steel Co., 183 Wis. 451, 198 N. W. 444.

Northwestern National Ins. Co. vs. Freedy, 201 Wis. 51, 227 N. W. 952.

The same rule has been expressed by this Court. In *Head and Amory vs. Providence Insurance Co.*, 2 Cranch 127, 2 L. Ed. 229, at page 242, we find the following language:

"Without ascribing to this body, which in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

To this source of its being, then, we must recur to ascertain its powers, and to determine whether it can complete a contract by such communications as are in this record."

We quote from *Thomas vs. West Jersey R. Co.*, 101 U. S. 71, as follows:

"We take the general doctrine to be in this country * * * that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that

the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The powers conferred on a corporation by its charter and the laws of the state creating it cannot be enlarged by Congress. Our dual system of government does not permit the Congress to amend or repeal the statutes of a state except on those subjects where the Federal Government has exclusive jurisdiction if it chooses to exercise it, e. g. bankruptcy. Cf. *Federal Land Bank of St. Paul vs. Crookston Trust Co.*, 180 Minn. 319, 230 N. W. 797.

In Wisconsin the charter of a corporation is a legislative act and must be given the same respect as any other state statute. *Casper vs. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754.

Petitioners will concede that the conversion which they are attempting to effect means the cessation of business by the building and loan association as a state corporation. If effected it means that the State is ousted of all jurisdiction over the association. The Federal Government becomes the sovereign of these corporations with full power to control and alter them as it sees fit. The State has been deprived of an instrumentality which it has created and controlled for its own benefit in the exercise of its governmental functions.

It makes no difference in this case whether the legal effect of conversion is a dissolution of the state association or simply a change of title and governmental supervision. Either consequence violates the statutes of the State of Wisconsin. These associations cannot be dissolved except in the manner provided by the Wisconsin statutes. Until their dissolution in this manner, i. e. after liquidation and payment to the creditors and shareholders of their interest in cash as provided by *Secs. 215.36 and 215.365, Wis. Stats.*

these associations must operate as State associations in carrying out the governmental function imposed upon them, under the control of the State. They have no authority to transfer their assets under any conditions, except as provided by State law under certain circumstances e. g. upon consolidation with another local association *(Sec. 215.335 Wis. Stats.)* and upon liquidation and dissolution.

It is respectfully submitted that the Federal Government has no right to take away a corporate instrumentality of the State even though that instrumentality may consent thereto.

The charter issued by the State and accepted by the instrumentality is a contract that cannot be discharged by the consent of only one of the parties thereto. The State has important rights and interests under the charter which cannot be brushed aside by the corporation. In consideration of the granting of the charter the corporation promised and agreed to carry on an important governmental function of the State under its supervision and control until such time as the holders of two-thirds of all its outstanding capital stock determined that they no longer desired to carry on this function. It is further agreed by the charter that upon such determination to cease doing business as an instrumentality of the State the affairs of the association would be liquidated under the control of the State and all creditors and stockholders paid their interest in cash.

The Respondent commission was created not only to see that the governmental function was properly discharged by these associations but also to protect the rights of its stockholders. The proposed conversions, it is submitted, violate the rights of those stockholders who do not desire their association to convert. The State statutes guaranteed these stockholders that the association would operate under the control of the State. They were further guaran-

teed by State legislation that upon cessation of business as a State instrumentality they would receive their interest in cash after liquidation by the State. In lieu of these rights, conversion forces them to accept an interest in a corporation controlled by another sovereign.

Even the State which reserved by its Constitution (Sec. 1 of Article XI of the Wisconsin Constitution) the power to alter or repeal corporate charters is powerless to take those rights away from any dissenting stockholder. Our Supreme Court points out that under the settled law in Wisconsin our legislature

> "* * * is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon non-consenting members of the corporation. A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder. Martin Orchard Co. vs. Fruit Growers C. Co., 203 Wis. 97, 233 N. W. 603; Huber vs. Martin, supra; 7 Ruling Case Law, p. 97. And there is a fundamental and material difference between being a member of a building and loan association over which the representatives chosen by the people of this state have the reserve power of control and being a member of one created by the legislative body of a different sovereign power" (R. Cause 55, p. 59).

It would seem that the vested rights of members of state building and loan associations or of its creditors should be protected from destruction or impairment by the Federal Congress under the provisions of the *Fifth Amendment of the Federal Constitution.* It is respectfully submitted that the contract arising upon the issuance of a corporate char-

ter by the State is just as sacred as any other contract, and the rights of all of the parties thereto must be observed.

To support their contention that the Congress has the power to authorize conversion of State corporations even though it may contravene State laws, the Petitioners rely chiefly on the case of *Casey vs. Galli*, 94 U. S. 673. This was an action brought by the receiver of a national banking association against a stockholder to enforce his statutory liability. The bank was formerly a state bank organized under the laws of the State of Louisiana and converted into a national banking association prior to its failure. In defense of the action the defendant filed, among other things, a plea in abatement challenging the right of the state bank to convert into a national banking association. The defendant claimed that as a result there was no national bank in existence. The Supreme Court disposed of the defendant's plea as follows:

At page 678:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat. 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

At page 680:

"There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such,

and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effect and consequences should be as if it were real, and the law properly so regards it, Eaton, et al., vs. Aspinwall, 19 N. Y. 119; s. c. Duer (N. Y.) 176; Cooper vs. Shaver, et al., 41 Barb. (N. Y.) 151; Camp vs. Burne, 41 No. 525; Danbury & N. Railroad Co. vs. Wilson, 22 Conn. 435; Ellis vs. Schmock & Thomas, 5 Bing. 521; McFarlan vs. The Triton Ins. Co., 4 Denio (N. Y.) 392; Rector & Co. vs. Lovett, 1 Hall (N. Y.) 191; Topping vs. Beckford, 4 Allen (Mass.), 121; Dooley vs. Wolcott, id. 407; Eppes vs. Railroad Company, 35 Ala. 33; Hamtramack vs. Bank of Edwardsville, 2 Mo. 169; Jones vs. Cincinnati Type Foundry, 14 Ind. 88; Worcester Med. Ins. vs. Harding, 11 Cush. (Mass.) 285; Hughes vs. Bank of Somerset, 5 Litt. (Ky.) 47; Tar River Nav. Co. vs. Neal, 3 Hawks (N. C.) 520."

It will be observed that the Supreme Court of the United States places its decision in the *Casey* case upon two grounds, viz.: (a) That no authority from the state was necessary to enable the bank to convert and (b) that the stockholder was estopped to deny the existence and legal validity of the new corporation. The latter ground is supported by ample precedent; the former, none.

A very important distinction must be noted between a bank which was the kind of corporation involved in *Casey vs. Galli* and a building and loan association which is involved in the present controversy. The powers vested in Congress by the Constitution with reference to currency and banking are of an entirely different nature than its powers with reference to the creation of local mutual building and loan associations. There is authority for the proposition that Congress has exclusive power, if it chooses to exercise it, over the creation and regulation of the business of commercial banking. At the time of the passage of our National Banking Acts it was pointed out that this legislation was intended to provide not only for the organization of new banks but to absorb the old state banks and establish a general exclusive banking system for the whole country. *State vs. Phoenix Bank*, 34 Conn. 205.

If the Federal Government has exclusive jurisdiction over the subject of banking and can completely eliminate State banks, then the language used by Justice Swayne in *Casey vs. Galli*, 94 U. S. 673, that no consent of the State is necessary to enable a bank to convert into a national banking association is justified. However, it must be conceded that the national government has no such exclusive jurisdiction over the subject matter of building and loan associations. It has no right to suspend the state laws on this subject. As we shall hereafter show it is very doubtful whether the national government has any power to create such organization at all. Surely there is no constitutional justification for permitting the national government to supersede the rights of the State to organize and control its own building and loan associations.

We respectfully submit that the language of the Court in *Casey vs. Galli*, 94 U. S. 673, that "it was as competent for Congress to authorize the transmutation as to create

such institutions originally" can only be justified if the Federal government had *exclusive* jurisdiction over the subject matter, upon choosing to exercise it. Otherwise the unexplained quotation is clearly in violation of the fundamental rights of the state. As an incident to their sovereignty, the states have the right to create corporations. The right to create carries with it the right to preserve, and the right to regulate and control. The right to create carries with it the right to define in what manner and upon what conditions the creature may cease to exist and cease to transact business as State institutions. We are not dealing with an individual who may move from Wisconsin to another state and thus become a citizen of a new jurisdiction. We are dealing with a creature of the state which is an instrumentality of the state.

The power to create a corporation is not the equivalent of the power to take away another's corporation any more than the power to own property is equivalent to the power of taking away another's property. It may be perfectly competent for the Federal Government to create a type of corporation, but how can it be said that this power includes the right to proselyte a corporation of another sovereign? If the subject of commercial banking, because of its close and intimate relationship and effect on our currency or because of its relationship to interstate commerce, may be taken over entirely by the Federal Government, the language of Justice Swayne is sound. *If the states had no power in the interests of their peoples to provide for the creation of local mutual thrift associations, to encourage the building of homes for their citizens, and the Federal Government had the power to take over this entire subject matter to the exclusion of the states,* then the rule of *Casey vs. Galli,* 94 U. S. 673, is applicable to the cases at bar, *and not otherwise.*

It would be an astounding doctrine that would hold that the Federal Government may supersede the rights of the states in legislating on a subject so inherently local and so intimately tied up with the welfare of the people of the state.

To take over banks created by the State without the State's consent, requires a more than liberal construction of the grant of power given to the Federal Government by the Federal Constitution. It is hard to justify the language in *Casey vs. Galli* 94 U. S. 673, relied on by Petitioners even as applied to banks. The creation of banks by the Federal Government is justified because the Federal Government needs these instrumentalities to carry on its financial affairs. But the States too need banks to carry on their financial affairs. They too need financial instrumentalities to act as depositaries and to perform the many fiscal functions incident to the successful carrying on of state government. Banks are just as necessary to the existence of the State as they are to the Federal Government.

After the State has created banks to act as its depositaries and as its fiscal agents and has by proper legislation imposed such safeguards on their operation as the State deems necessary or proper, can the Federal Government authorize the conversion of these instrumentalities and upon such conversion remove them entirely from the control of the State, changing their nature and character, lifting the safeguard imposed by the State, and, if it pleases, totally disable them from performing the governmental function which prompted their creation in the first instance by the State?

The State may desire an added liability of stockholders in its instrumentalities; it may desire to restrict the types and size of loans made by them; it may desire to limit the field of its investments. All these safeguards and dozens more which can be enumerated may be removed after con-

version, for Petitioners concede that after conversion the State loses all control of the instrumentality.

It is submitted that the doctrine which authorizes the Federal Government to take over State banks without State consent stretches the Federal Constitution to the breaking point. The right to create its own banking instrumentalities does not include the right to take away the banking instrumentalities of the sovereign states unless perhaps such taking over be necessary for the very preservation of the Federal Government. Such necessity does not exist.

Even assuming that the Federal Government has the power of conversion with respect to banks, we shall hereafter show that this power cannot be applied to corporations involved in these causes because of the many important differences between building and loan associations and banks which compel the conclusion that the Federal Government is without power to even create its own building and loan associations in the first instance.

An acceptance of the doctrines urged by Petitioners that the Federal Government has the power to transmute any State corporation which it can create in the first instance and that the Federal Government has the power *to create* any corporate instrumentalities that it pleases which directly or indirectly may aid the Federal Government by purchasing of government bonds or promoting the "general welfare" can easily mean complete ruination of the several states. If the Federal Government has the broad and comprehensive powers of creation that Petitioners urge it possesses it can create almost every conceivable type of corporation public or private. Upon creation or conversion they are freed from all control or regulation by the several states within whose domain they function. They are not subject to state taxation unless the Federal Government permits it. *McCulloch vs. Maryland*, 4 Wheat. 316, 416;

Osborn vs. Bank of United States, 9 Wheat. 738. Any exercise of this claimed power by the Federal Government takes away from the State a substantial portion of its sovereignty not theretofore delegated to the Federal Government and deprives the State of a source of revenue. It would be an easy matter for the Federal Government, if it possesses the powers which Petitioners' ascribe to it, to so impoverish the states as to render them unable to carry on these governmental functions still left to them.

III.

The Federal Government has no power to create building and loan associations.

A prerequisite to the right to incorporate is the consent of the sovereign power. In England no corporation could be created without the consent of the King. *I. Bl. Comm. 472, Adams Case, 4 Cooke 107B.*

In the United States this sovereign power is vested in the legislative departments of the various states. The power which is inherent in the State legislatures has no counterpart in the powers of Congress.

However, the various specific powers granted by the Constitution of the United States are augmented by the provision that Congress shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested in this Constitution in the Government of the United States, or in any department or officer thereof (Article I, Section 8, Clause 18 of the Federal Constitution). Under this provision it has been held since an early date that the power to create a corporation was vested in Congress, whenever the corporation is a necessary or proper means for

carrying into execution any power which is conferred by the Constitution upon the government of the United States or upon any department or officer. *Fletcher Cyclopedia Corporations*—Permanent Edition, Vol. 1, Sec. 121.

Thus it appears that in so far as the creation of national corporations is concerned, the power of Congress is controlled in this respect, viz: the creation of the national corporation must be "necessary or proper for the carrying into execution * * * the powers vested by this constitution in the government of the United States, or in any department or officer thereof."

What power, express or implied, of the Federal Government supports its creation of these savings and loan associations? What lawful power is the Federal Government attempting to carry out when it organizes these associations? The purpose of their creation is well stated in Section 5 (a) of the Home Owner's Loan Act of 1933 as follows:

> "In order to provide local mutual thrift institutions in which people may invest their funds, and, in order to provide for the financing of homes, the Board is authorized * * * to provide for the organization * * * of associations to be known as Federal savings and loan associations, and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States."

Is it a province of the Federal government to provide for *local* mutual thrift institutions and to provide for the financing of homes for the citizens of the various states? It is submitted that this subject is one of exclusive state domain, and that the attempt by Congress to create these Fed-

eral savings and loan associations is wholly outside its powers.

Petitioners point to the following express powers of the Congress to sustain the creation of these associations:

"1. The power to tax,

2. The power to borrow,

3. The power to make all laws necessary and proper in executing the foregoing powers" (Page 30 of Petitioners' Brief).

The power given to Congress to lay and collect taxes does not justify the sponsoring and regulation of Federal savings and loan associations, unless this power be construed as a grant to Congress of the unlimited power to enact general welfare legislation wholly disassociated from the power to tax. It is submitted that Clause I of Section 8, Article 1 of the United States Constitution cannot be so construed. If this construction is adopted, our Federal Government is changed from a government of limited delegated and enumerated powers to one of unlimited powers, and the States would be deprived of a substantial portion of the power reserved to them upon the adoption of the Federal Constitution.

The taxing power of Congress is not applicable to these causes. We are challenging the power of the Federal Government to organize, regulate and control local mutual thrift associations whose prime purpose is to raise money among its members to aid the members in acquiring or building a home. It is not contemplated that these institutions should serve as a distributing agent for Federal funds. The Federal Government aids them in the beginning by purchasing stock in the local associations. This stock must be re-purchased by the associations (Sections 5 (g) and 5 (j) of the

Home Owner's Loan Act of 1933, printed at pages 63-65 of Petitioner's brief). *In substance, the Federal Government makes a loan to the local association to permit it to start in business.* After that, it is contemplated that they shall continue in business exclusively on the monies raised among their own members, but the Federal Government continues to regulate and control them.

We feel therefore, that the scope of the Federal Government's power on the subject of taxation is not involved in these causes unless the clause granting this power be construed as containing an independent grant of power to the Federal Government to enact any legislation which it may deem in the public welfare. Even the Petitioners do not advance this contention for on page 30 of their brief appears a statement that the clause involved "has been construed as a qualification or limitation upon the taxing power rather than as creating an independent power of Congress."

Petitioners, however, apparently do contend that the Federal Government has the power to tax and appropriate for any purpose affecting the common good of the citizens or a large part of them without reference to the enumerated powers in the Federal Government. This is the premise upon which they base the right of the Federal Government to legislate upon the subject of home ownership and home financing. It is argued in substance that if the Federal Government has the power to give money raised by taxation to the citizens of the nation, the Federal Government can create an agency to lend this money along with the money of others to these citizens and that the Federal Government can regulate and control these agencies in all respects, even, it must be assumed after the Federal money has been repaid and the power to tax no longer involved.

The scope and meaning of the general welfare clause has been the subject of much discussion and controversy. We

believe that one of the most exhaustive studies and ablest analysis of this clause was recently made by the Hon. Newton D. Baker and the Hon. James M. Beck in opinions rendered to the President of Edison Electric Institute dated November 22, 1934 and January 11, 1935 (cited with approval in *Duke Power Company vs. Greenwood County*, S. C. 10 F. Supp. 854, 869). For the convenience of the Court and by permission we are printing the portions of these opinions relating to the General Welfare clause as an appendix to this brief.

Nor can the power to borrow money given to Congress (Article I, Section 8, Clause 2 of the United States Constitution) sustain the creation of these local institutions. It is not the Federal Government's purpose to *borrow* money from these institutions. On the contrary, the Federal Government proposes to *lend* money to them in order that they may begin the business for which they are organized, i. e., to lend money for home purposes. The savings and loan scheme of operation prevents these institutions from becoming a source from which the government can borrow money. *They cannot receive deposits* (Section 5 (b) of Home Owner's Loan Act of 1933 printed at page 62 of Petitioner's brief). The building up of cash reserves is contrary to their scheme of operation. It is intended that all of the monies received by them are to be promptly loaned out on long term loans to serve the purpose for which they were created.

They are given the power to invest in government securities, not for the purpose of aiding the government but for the purpose of aiding the institutions in safely carrying on their functions. Of necessity, the association will at times have funds temporarily on hand. It cannot loan every dollar that it collects the moment that it is paid into the association. Government securities are a safe investment which can readily be converted into cash when needed for loans.

For these reasons, the associations are expressly empowered to invest in such securities. This grant of power is not made to aid the sovereign, but to aid the association in carrying on its business of collecting and lending money for acquiring or building homes.

We submit that Congress cannot assume the power to create corporations by the simple expedient of authorizing them to invest in government bonds. If this were not true, the Federal Government could, by legislation, organize every conceivable corporation, private, charitable and municipal, by authorizing them to invest in government bonds, a power which most of these corporations customarily possess.

The third power to which Petitioners point, to sustain the right of the Federal Government to create these local institutions, is the power in Congress to make all laws necessary and proper "in executing the foregoing powers" (United States Constitution, Article I, Section 8, Clause 18). Obviously, this is not a grant of any new and independent powers. Petitioners must still look to the "foregoing" powers for the authority in Congress in question.

As judicial precedents Petitioners rely upon the cases which held that Congress has the power to incorporate banks.

The first of these decisions were *McCulloch vs. Maryland*, 4 Wheat. 316 and *Osborn vs. Bank of United States*, 9 Wheat. 738. These two cases discuss the power in Congress to incorporate the second Bank of the United States. This bank was made a depositary of the United States Government. Its creation was sustained as an appropriate instrument for conducting the fiscal operations of the Federal Government.

In 1864 Congress passed general acts for the incorporation of national banks, and the constitutionality thereof were discussed in *The Farmers' & Mechanics' National Bank of Buffalo vs. Dearing*, 91 U. S. 29. The Court there states:

> "The constitutionality of the Act of 1864 is not questioned. It rests on the same principle as the Act creating the second Bank of United States. The reasoning of Secretary Hamilton and of this court in McCulloch vs. Maryland, 4 Wheat. 316, and in Osborn vs. Bk., 9 Wheat, 738, therefore, applies. The national banks organized under the Act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end * * *."

In *Smith vs. Kansas City Title & Trust Co.*, 255 U. S. 180, the creation of Federal land banks and joint stock land banks with limited banking powers was upheld by this Court. *These banks were depositaries for Federal monies.* They were required to invest a certain portion of their moneys in United States bonds. Again the governmental purpose which prompted the creation of these institutions was relied upon to sustain the Congressional power.

It is perfectly clear from a reading of these cases that the function of lending money to private citizens of the United States exercised by all of the institutions involved, furnished no justification for their creation by the Federal Government.

Thus in *Osborn vs. Bank of United States*, 9 Wheat. 738, Justice Marshall speaks as follows:

> "* * * That the mere business of banking, is in its own nature, a private business, and may be carried

on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of McCulloch vs. The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States' * * *.

* * * * * *

Why is it that Congress can incorporate or create a bank? This question was answered in the case of McCulloch vs. The State of Maryland. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? *If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter.* If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution * * *" (Italics ours).

The governmental purpose which sustained the creation of the second Bank of the United States is well illustrated by the following quotation from the dissenting opinion on the point of jurisdiction by Mr. Justice Johnson in *Osborn vs. The Bank of the United States*, 9 Wheat. 738:

"The Bank of the United States is now identified with the administration of the national government.

> It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; *and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury* * * *" (Italics ours).

The ratio decidendi of these bank cases completely negatives the contention advanced by Petitioners that Congress has the power to create corporate instrumentalities for the purpose of aiding private citizens in acquiring homes.

The argument presented by Petitioners, i. e. that Congress has the power directly to use public moneys for the purpose of aiding home financing, and that therefore it may create corporate instrumentalities to the same end, was ably advanced in *Smith vs. Kansas City Title and Trust Company*, 255 U. S. 180, to justify the creation of the bank there involved as an agency to stimulate agricultural development. The Court, however, did not, and it is respectfully submitted could not, place its decision upon that ground. The stimulation of home ownership is no more a function of the Federal government than the stimulation of agricultural development. The jurisdiction of both subject matters is vested exclusively in the several states.

There is a further distinction between these bank cases and the causes at bar. A building and loan association is not a bank. It should not even be classified as a "moneyed corporation" as Petitioner suggests. It is not a corporation organized for the purpose of carrying on a business for pecuniary profit.

"Building and Loan associations, in their very nature are semi-philanthropic institutions and have a two-fold purpose, to encourage thrift and to encourage the borrowing of money for any lawful purpose, principally the purchase of a home. One of their main features is perfect mutuality, reciprocity and equality of all its members. Every gain and advantage or benefit must be shared equally by all its members, be they borrowers or non-borrowers." *Sundheim Building and Loan Associations, Third Edition, Paragraph 8.*

"* * * They are not commercial bodies in the large or popular sense of the term. They are, rather, limited co-operative, home building co-partnerships." *1 Fletcher Cyclopedia Corporations, Permanent Edition, Sec. 76.*

We quote from the opinion of Judge Geiger in *Mutual Bldg. & Sav. Ass'n vs. Wilkinson*, 8 Fed. (2d) 183 at page 183:

"The plaintiff is a corporation organized under the laws of Wisconsin, and its business and purpose is 'the creation and care of a mutual savings fund for the payment to it by its members, and the making of loans to its members therefrom, upon real estate securities and upon such other securities as are authorized by the laws of the State of Wisconsin.'

The laws of Wisconsin define quite clearly its powers and its limitations. It can issue stock and make loans to members only, upon their subscriptions, or upon their obligations, for payment or repayment in accordance with the statutes, charter, and rules. Like all such societies, payment for stock or repayment of loans is prescribed upon the ordinary

installment plan; and there is a general classification of non-borrowing and borrowing membership or stock. It will be assumed that the charter and status of the plan is well recognized under and outside of the statutes as an instrumentality to promote small or moderate installment savings of members to accumulate a fund or to enable the building, principally, of homes, through loans to be discharged by installments. That the Statutes of Wisconsin reflect this purpose is shown, for example, by provisions forbidding 'any loans upon property used for manufacturing purposes, or any theater, public hall, church, school building, hotel, or garage,' and also by the provision that mortgages upon real estate 'a non-negotiable note or bond' shall evidence the debt."

An opinion of the Circuit Court of Appeals in the same case contains the following language, 13 Fed. (2d) 997, at page 998:

"We must take judicial notice of the Wisconsin law relating to building and loan associations. It is a matter of common knowledge that as to such associations there are certain fundamentals: (a) That their purpose always has been to enable persons of moderate means, by small monthly contributions, to become home builders and owners; (b) except occasional borrowings to cover emergencies, they borrow no money and have no business other than the accumulation of money from the sale of their shares, usually on monthly payments, to their members, and the lending of that money to their members, who wish to buy or build homes, so that the sole profit comes from the use, by the borrowing members of the money paid in by all the members on their respective shares of stock."

The business of a building and loan association does not compete with the business of a bank. Thus it has been held that the capital invested in building and loan associations cannot be regarded as moneyed capital in competition with the money invested in national banks within the meaning of the Act of Congress (12 U. S. C. A. 548) which permits the taxation of shares of stock of national banks by a state provided that the tax imposed "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks." *Mercantile National Bank vs. Hubbard*, 98 Fed. 465; *Hoenig vs. Huntington Nat. Bank of Columbus*, 59 Fed. (2d) 479. Certiorari denied, 287 U. S. 648.

Petitioners further argue that these associations are fiscal agencies of the Federal Government and that therefore Congress has the power to create them. They argue that these institutions are fiscal agencies of the Federal Government for substantially three purposes: (a) To apply Federal monies for a Federal purpose, i. e. the encouragement of home ownership; (b) Under *Section 5 (k) of the Home Owners Loan Act of 1933* (added by amendment of April 27, 1934) any association "or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed * * *" or may act as agent for any other instrumentality of the United States; (c) They may purchase government bonds (page 42 Petitioners' Brief).

(a) In considering the first purpose it must be borne in mind that the Federal Government is advancing money to these associations only in the beginning to enable them to start in business. This money must be repaid (Sections 5 (g) and 5 (j) of the Home Owners Loan Act of 1933; pages 63 and 65 of the Petitioners' Brief). Thereafter it is con-

templated that these associations shall operate on their own funds and not as financial agents for the distribution of Federal funds. However, the Federal Government proposes still to retain control and regulation of these corporations. The Federal Government has not limited itself in this legislation to the protection of its funds. It proposes to set up in the several states permanent structures operated and financed by private citizens of the states freed from the control and regulation of the states.

If sponsoring and regulating home ownership within the several states is not within the domain of the Federal Government, and it is respectfully urged that it clearly is not, then of course, the creation of an agency for this purpose is wholly beyond the powers of Congress. If the Federal Government can pass laws regulating this subject matter, it is difficult to conceive of any power which it does not possess. Presumably every act of every legislative body is in the "general welfare."

(b) *Section 5(k) of the Home Owners Loan Act of 1933* reads as follows:

> "(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States."

This section was not a part of the original act. It was added by an amendment on April 27, 1934.

It was not the purpose of Congress in enacting this amendment, which provides in substance that these associations may act as "fiscal agents" of the Federal Government in the event something can be found for them to do as such, to change the nature of the corporation which it had theretofore created. It was still a building and loan association created for the express and sole purpose of providing "local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes" *(Section 5 (a) of the Home Owners Loan Act of 1933)*.

If Congress has the power to incorporate by the simple expedient of reciting the formula contained in Section 5 (k) in spite of the obvious purpose of the corporations appearing on the face of the law which created them, then there is no limit to the Congressional power. It is not confined to the organization of those corporations which are necessary or proper in carrying out its governmental functions. It can organize and exercise exclusive jurisdiction over every conceivable type of corporation. It can strip the states of one of their principal sources of revenue. It can virtually exhaust the reserve powers vested in the several states.

Petitioners urge that no one, not even this Court, may question the motives of Congress in enacting legislation. If by "motives" is meant the considerations which prompted Congress to enact this legislation outside of what appears within the four corners of the act, we need not here quarrel with this doctrine.

It is apparent upon the face of the act that the purpose of Congress was not to create an agency to carry on some designated governmental function. *It is apparent that at the time it amended this act by adding Section 5 (k) it had no specific governmental duties in mind which these asso-*

ciations could perform. Hence we find this vague and indefinite formula, invoked in the creation of so many of the recent corporations formed by Congress, which means nothing more than that these associations may perhaps be called upon to perform a presently undetermened governmental function, if it is "reasonable."

We quote from *Linder vs. United States,* 268 U. S. 5, at page 17:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

(c) The third alleged governmental function of these associations is the purchase of government bonds by these associations. Here too the Federal Government would be awarded unlimited jurisdiction over the creation and regulation of every conceivable type of corporation if Petitioners' contentions were adopted. Under Section 5 (c) of the Home Owners Loan Act of 1933 (page 62 of Petitioners' Brief) it is provided:

> "* * * That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank."

These associations are not required to buy government bonds. They are not authorized to *deal* in government

bonds as Petitioners erroneously suggest (page 42 of Petitioners' Brief). They are authorized to buy these securities to aid them in carrying on the building and loan business for which they were organized. As we have heretofore pointed out the idea of building up reserves is contrary to the building and loan plan of operation. It cannot properly discharge its function if it attempts so to do. Its plan of operation requires that it promptly lend the money that it gathers to provide citizens for home purposes. Its only purpose in buying government bonds is to keep safe that portion of its funds which it cannot currently loan.

If the Federal Government can create corporations for the purpose of providing customers for government bonds, our large industrial corporations or municipal corporations would be much more fitting subjects of Federal control. These corporations are normally large buyers of government bonds. If the Federal Government can organize these small local building and loan associations by authorizing them to buy government bonds a fortiori they may create these large industrial corporations and municipal corporations within the states.

It is respectfully submitted that the Federal Government may organize and govern corporations within the states only when such legislation is necessary and proper for carrying into execution its enumerated powers. Congress cannot exceed the bounds of necessity and propriety. It can only create true governmental instrumentalities. If private functions normally reserved to the control of the state are necessary to enable these instrumentalities to exist in order to perform their governmental functions, then and only then, can Congress endow these instrumentalities with private functions.

In the creation of these Federal Savings and Loan Associations the Congress has completely disregarded the true

nature of its powers. It did not intend to create an agency to perform functions of the Federal Government. It intended as the purpose of the act (Section 5 (a) of the Home Owners Loan Act of 1933, page 62 of Petitioners' Brief) frankly recites, to create a local corporation for the purpose of carrying into execution powers which clearly belong to the state and are not within the Federal domain.

IV.

Assuming that Congress has the power to create and regulate building and loan associations such power has been improperly delegated to the Federal Home Loan Bank Board.

Section 5 (a) of the Act reads as follows:

"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

The act of creating a corporation is a sovereign act. In the several states of the United States, this sovereign power is vested in the legislature of the state. The power to create national corporations is vested in Congress. The established rule on the subject of delegation of the power to incorporate is stated in *14 Corpus Juris* 100, as follows:

"* * * the legislature cannot delegate the power to legislate which is vested in it by the constitution;

and therefore the general rule is that it cannot delegate the power to create corporations either to another corporation or to an individual, to a court or other tribunal, or to an executive or administrative officer or body; nor can a state legislature enact laws creating corporations or enlarging their powers, which are to take effect only when approved by a vote of the people, unless the constitution so provides. This principle, however, does not prevent the legislature from itself creating corporations either by special or general laws and delegating to a court, board, or officer judicial or ministerial authority with respect to their formation or organization, including the power to find the facts necessary to the creation of a corporation, to determine whether the conditions prescribed by the statute have been complied with, and if so, to make an order of incorporation or to grant a charter or certificate of incorporation. * * *"

Under *Section 1 of Article I of the Constitution of the United States* all Federal legislative power is vested in the Congress of the United States.

Under the Act in question Congress has delegated to the Federal Home Loan Bank Board much more than the power to execute mere ministerial acts. Their power is not limited to filling in details. In the main, no legislative standards have been set up for the operation and regulation of these associations.

The Board is given the power to operate and regulate these associations "giving primary consideration to the *best practices* of local mutual thrift and home financing institutions in the United States." The determination of the question of what constitute the best practices among the

many adopted in the various States is a question which must be decided by the Congress. It is a question of legislative wisdom and policy.

The determination of the plan of operation is left entirely to the Board. Substantially all of the powers with which these associations are to be endowed, lie in the discretion of the Board. The degree and manner of supervision of these institutions is left entirely to the Board.

Thus the Board may adopt the Terminating plan, the Serial plan, the Permanent plan, the Ohio plan or the Guaranteed Capital Stock plan in determining the scheme of operation. The customary enumeration of powers that may be exercised found in the statutes which authorize the creation of a type of corporation is missing in this Act. The only grants or limitations are contained in *Sections 5 (b) and 5 (c)*. The rest of the field is left wide open to the Board. As to examination and supervision, we can find no standards of any kind except what the Board deems best.

Among the numerous matters of policy that should have been decided by Congress and not left for determination by the Board without adequate standard are: The question of size of these associations normally regulated by statute to fit the particular policy of the sovereign; the rights of shareholders to withdraw before maturity and their rights upon withdrawal; the maintenance of contingent funds; the rights of borrowing and non-borrowing members upon liquidation; the right to make loans to non-members; and the rights of shareholders upon forfeiture.

The power given to the Board is virtually the power to determine what should and what should not be the law with reference to the organization, examination, operation and regulation of the associations. The Board is also given full power to provide for the reorganization, consolidation, merger or liquidation of the associations, including the

power to appoint a conservator or a receiver to take charge of the association and to require an equitable readjustment of the capital structure of the same, all without limitation or standard.

It is respectfully submitted that the powers given to the Board are more than administrative functions. They are law-making functions which cannot be delegated by the Congress.

It was held by this Court in *Schechter vs. United States*, ... U. S. ....., 79 L. Ed. 888 at page 894:

"• • • We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Ref. Co. vs. Ryan, 293 U. S. 388, ante, 223, 55 S. Ct. 241.

The Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives' Art. I, Sec. 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. I, Sec. 8, Par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We point out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down pol-

icies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within proscribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.

But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

Conclusion.

If the Court feels that Sec. 5 (i) of the Home Owners' Loan Act of 1933, as amended, must be construed as attempting to eliminate the necessity of State consent to conversion, we respectfully submit that this section of the Act must be declared unconstitutional.

The framers of the Act anticipated the possibility that some of its provisions might be held unconstitutional and enacted the separability provision contained at the end of the Act and which reads as follows:

"Sec. 10. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

It is the purpose of the State in this action to protect its building and loan associations and keep them under its own sovereignty. We are thus primarily concerned with the

provisions of Sec. 5 (i) of the Act. The Court may or may not desire to consider the constitutionality of that provision of the law which authorizes Congress to create in the first instance federal savings and loan associations. If it determines that Sec. 5 (i) of the Act must be construed as we contend namely, that conversion cannot legally be had in contravention of the law of the State, it is, of course, unnecessary for the Court to pass upon the power of Congress to create federal associations. However, it is submitted that Congress is without right or power even in the first instance to create federal savings and loan associations.

The legislative history of the building and loan associations in the State of Wisconsin indicates that these associations have always been a favorite subject in our State. From time to time the legislature has developed the law with respect thereto so that today we have a complete codification of laws relating to building and loan associations which, as a whole, reflects the public policy in this State as to these institutions. This policy includes not only the method of doing business but also the protection of the stockholders and their mutual interests in the associations. The business of these corporations is simple, direct, and local. It consists of gathering together from members monthly contributions until they reach an amount sufficient to permit the making of loans *to the members*. These loans are made primarily upon the homes of these members. It is a far cry from this idea of localism to permit an outside sovereign to capture this favorite subject of the State and federalize a subject matter that is so peculiarly and inherently local in its nature, and intimately associated with the welfare of the people of the State.

We need not emphasize the seriousness and importance of these cases to the State not only in determining this controversy affecting one of its favorite subjects, but as a precedent for similar legislation. If the Federal government

can thus seize our building and loan associations, logically it can then take away all of our corporations. The reasoning of counsel, opposed, if adopted, would mean that every corporation in this State, large or small, interstate or local in business, could oust the State of jurisdiction over it, if the Federal government saw fit to provide for their conversion. Such doctrine, if adopted would shatter the settled law on the respective rights and powers of the State and the Federal government as declared in our Constitution. The Federal government is one of enumerated, delegated powers, with the reserve powers vested in the States and the people. The power of the Federal government to create a bank necessary to carry on its governmental functions was seriously questioned by the framers of the Constitution but was finally upheld by Chief Justice Marshall in *McCulloch vs. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, and *Osborn vs. The Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204. The doctrine of these cases was extended to permit the Federal government to establish a national banking system to carry on its governmental functions. Now the Court is asked to take a far-reaching step and declare that the Federal government has the power not only to create an inherently local and, in our opinion, non-governmental corporation, but to authorize *the taking away* of a purely local institution sponsored by the State. Assuming that the Federal government has the power to create such a corporation, which, we submit, is in itself an extreme step under the Constitution, we cannot see how this authority can possibly justify a right in the Federal government to authorize the taking away of the agencies which the State has created for its people and which it feels are necessary for their general welfare.

We have here presented a question of the powers vested in Congress by the people of the United States. If it is their wish to endow Congress with the power to take away any of

the states' rights, they may do so. They may abolish states entirely if they choose. From time to time the people of the United States have amended our constitution. Until it is further amended in the manner provided by law it stands as the will of the people. Today that will demands that Congress of the United States stay within its sphere of certain enumerated delegated powers and that the states exercise the remainder. The function of fostering and encouraging the building of homes through the medium of local mutual societies has been given by the people to the states and not to the Federal government. Unless and until the people take this power away from the states and vest it in Congress, we respectfully submit that the Federal government has no power to enact this legislation.

Respectfully submitted,

J. E. FINNEGAN,
Attorney General,
BENJAMIN POSS,
JOSEPH P. BRAZY,
Special Counsel,
Attorneys for Respondents.

APPENDIX.

The portions of the opinion of Newton D. Baker and James M. Beck rendered to the President of Edison Electric Institute covering the meaning and scope of the phrase "General Welfare" in Article I, Section 8, Clause 1, of the Constitution of the United States

JUDICIAL TREATMENT OF THE PROBLEM.

In *Gibbons vs. Ogden,* 22 U. S. (9 Wheat.) 1 (1824) Chief Justice Marshall said at page 199:

"Congress is authorized to lay and collect taxes, etc., to pay the debts and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what congress is empowered to do. *Congress is not empowered to tax for those purposes which are within the exclusive province of the States.* When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce." (Italics added.)

Justice Story apparently construes the foregoing language of Chief Justice Marshall as supporting the Hamilton construction of the taxing clause *(1 Story on the Constitution, 678)*; but it is also cited in support of the Madison interpretation. And it is submitted that the language, and particularly the sentence underlined, is more consistent with the Madison interpretation; for it seems to exclude from the Congressional power of taxation and appropriation all purposes reserved to the States under the Tenth Amendment.

In *Field vs. Clark,* 143 U. S. 649 (1892), the question whether the Congress could appropriate for purposes not within the enumerated powers was raised, but the Court found it unnecessary to decide the question. Mr. Justice Harlan said, at page 695:

> "Appellants contend that Congress has no power to appropriate money from the Treasury for the payment of these bounties, and that the provisions for them have such connection with the system established by the act of 1890 that the entire act must be held inoperative and void. The question of constitutional power thus raised depends principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress power 'to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.' Art. I, Sec. 8. It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching. But the argument that the validity of the entire act depends upon the validity of the bounty clause is so obviously founded in error that we should not be justified in giving the question of constitutional power, here raised, that extended

examination which a question of such gravity would, under some circumstances, demand."

United States vs. Gettysburg Electric Ry. Co., 160 U. S. 668 (1896 Peckham, J.), involved the power of the United States to condemn land for the purpose of acquiring the site of the Battle of Gettysburg. The scope of Article I, Sec. 8, Clause 1 was discussed by counsel, but it does not appear that the decision of the Court, sustaining the power of the Government, turned upon any construction of that clause.

In *United States vs. Realty Co.*, 163 U. S. 427 (1896 Peckham, J.), the question whether the Congress has the constitutional power to make appropriations for purposes other than those embraced by the enumerated powers, was again presented, and the Court again found it unnecessary to pass upon the question. The Court said that this was a question of the gravest importance, which "should not be decided without very mature investigation and deliberation and only when absolutely necessary to the determination of the rights of the parties" (Loc. Cit. 433). The Court avoided passing upon the question by holding that the power to pay debts under Article I, Sec. 8, Clause 1 included the power to pay merely moral obligations. On this point the Court said, at page 440:

"* * * The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The Nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the

honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the Government which are thus founded."

In *Smith vs. Kansas City Title & Trust Co., et al.*, 255 U. S. 180 (1921 Day, J.), Mr. (now Chief Justice) Hughes argued on behalf of the Federal Land Banks that Congress had power under the Tax Clause to use the public money to aid in agricultural development throughout the country, and hence could create a revolving fund to be used through loans for that purpose, and that this was a public purpose, and a national rather than local purpose. The decision of the Court, however, is rested upon the power of the Federal Government to create fiscal agencies and the like, and does not discuss the question of whether Federal power exists to appropriate for a non-Federal purpose. In the companion cases of *Massachusetts vs. Mellon* and *Frothingham vs. Mellon*, 262 U. S. 447, the question was sharply raised whether the Congress has the power to appropriate money for purposes not comprehended within the enumerated powers of the Federal Government. Both cases went off on the technical ground that neither party had any justiciable standing in court to raise the question, so that there is no discussion of the merits by the Court, but an avowed disclaimer that Court sustained the validity of the appropriation.

These are believed to be all of the cases in which the question whether the Taxing Clause carries power to levy taxes and appropriate for non-Federal purposes has been raised or adverted to in the Supreme Court. The question has, however, been considered in the lower Federal Courts and decided in at least two cases.

In *United States ex rel. The Miles Planting & Mfg. Co. vs. Carlisle,* 5 App. Cas., Dist. of Columbia, 138 (1895 Shepard, J.), the plaintiff, a sugar producer, sought mandamus to compel the Secretary of the Treasury to pay the sugar bounty authorized by the McKinley Bill of October 1, 1890. The Government contended, among other things, that it was beyond the constitutional power of the Congress to appropriate money for such a bounty. The Court held the statute was unconstitutional, upon the ground that the power of the Federal Government to appropriate money under Article I, Sec. 8, Clause 1 is limited to a Governmental purpose, that is, an authorized Governmental function of the Federal Government.

The Court said in part at page 155:

> "The power to levy taxes is one of the greatest, and to the citizen one of the most directly important, powers that can be exercised by any government. Within certain conceded boundaries, it is absolute, and unlimited save by the discretion of the law making power. It may be used to cripple or even destroy an industry or a business. The only refuge from its inordinate exercise, in this country, is by the peaceful revolution of popular elections. In our judgment, the true limitation of the power to impose taxes, conferred by the foregoing clause, is that the purpose must be public, that is to say, governmental."

Those cases in which the "general welfare" phrase of Article I, Sec. 8, Clause 1, has been unsuccessfully invoked as a source of Federal power to make regulations rather than to levy taxes and make appropriations are not in point, and do not seem to be particularly helpful, although the language in some of them might seem to militate against the power to make appropriations for non-Federal pur-

poses as well. See *United States vs. Boyer,* 85 Fed. 425 (D. C. Mo., 1898); *Amazon Petroleum Corporation vs. Railroad Commission* (D. C. Tex., Bryant, D. J., 1934), 5 Fed. Supp. 639, 647-8, reversed on other grounds, 71 F. (2d) 1; *Hart Coal Corporation vs. Sparks U. S. Attorney* (D. C. Ky., Dawson, D. J., 1934), 7 Fed. Supp. 16, 25-26, 27-28.

But the question was recently presented and decided in *Missouri Utilities Co. vs. City of California, Mo.* (D. C. Mo., Otis, D. J., 1934), unreported. In that case the plaintiff, holding a certificate of convenience and necessity to supply electric service in the defendant city, brought a suit to enjoin the defendant city from proceeding with the construction of a duplicate local electric utility with funds supplied by the United States. Out of the total cost of $135,000, $100,000 had been obtained by the sale of bonds to an agency of the United States, and the remaining $35,000 had been made available by a grant for that purpose from the Public Works Administration. Secretary of the Interior Ickes, as Public Works Administrator, intervened and filed a motion to dismiss. The Court held that the power of the Federal Government to make loans and grants in aid of the construction of a local utility not engaged in interstate commerce could only be sustained if it were found that under Article I, Sec. 8, Clause 1 the Federal Government is empowered to appropriate Federal funds for non-Federal purposes, so long as they be deemed for the general welfare. The Court, after discussing the question at length, summarized its decision upon this point as follows:

> "My conclusion is that the Congress has the power to appropriate money for the promotion of the general welfare and that it is not restricted in so doing to objects germane to its other delegated powers. Congress therefore has the power to appropriate money for the relief of any condition of un-

employment which is not merely local but is national in its extent and hence inimical to the general welfare. I have reached this conclusion from a consideration of the text of the Constitution, of the views of the commentators, of legislative and executive construction of the Constitution, and of the decisions of the Supreme Court. A conclusion so well buttressed scarcely needs to be but further is fortified by the firmly established rule that any mere doubt as to the validity of an act of Congress must be resolved in favor of its validity." (Unreported Opinion, pp. 19-20.)

The Court then proceeded to examine the question whether the loan and grant of money to aid in the construction of a local utility was in the legitimate promotion of the general welfare. The question whether, assuming that the Taxing Clause empowers Congress to make appropriations for non-Federal purposes, the loan and grant of money for the construction of a duplicate local municipal utility is for a public purpose or is within the meaning of the general welfare clause as used in the Constitution will be considered at a later point in this memorandum.

We come now to the question: In the light of the language of Article I, Section 8, Clause 1, the history of that Clause, the conflicting views of the early Statesmen, Jurists and Scholars and such examination of the subject as has been had in the courts, what is the correct construction of the Clause?

It is submitted that the Hamilton thesis that the "general welfare" phrase in the Tax Clause is a grant of power to tax and appropriate for purposes over which the Federal Government has no jurisdiction and in fields not other-

wise delegated to it but reserved to the States has its foundation and inception in a fundamental falacy. It rests upon the assumption that a grant of a power of taxation and appropriation is an independent power and purpose of Government unrelated to and unlimited by the scope of governmental powers with which the taxing Government is endowed. It rests upon the proposition that the scope of a grant of a power of taxation and appropriation is to be determined by a literal examination of the words of the grant, while excluding from view or consideration the nature of the Government to which the grant is attached or the powers for the performance of which the grant is provided as a means. This proposition cannot be sustained as a matter of principle, as a matter of authority, or as a matter of history.

The levying of taxes and the making of appropriations are not ends or purposes of government. Governments are never created merely to levy taxes or to make appropriations. Taxes and appropriations are but instrumentalities through which it is possible to exercise the powers and functions of Government. The nature and purpose of the taxing power in a Republican form of Government precludes its exercise or existence outside the field of governmental power, for it exists only for the purpose and to the extent necessary or appropriate for doing that which is within the powers to be carried out by the Government. This is a fundamental principle. Thus the power of every sovereign State and its political subdivisions, acting under its authority, to tax and make appropriations is limited to the purposes which the particular government is authorized to carry on as a part of its proper functions. *Loan Association vs. Topeka*, 87 U. S. (20 Wall.) 655; *Parkersburg vs. Brown*, 106 U. S. 487; *Cole vs. la Grange*, 113 U. S. 1, 9; *Green vs. Frazier*, 253 U. S. 233; *Dodge vs. Mission Township* (C. C. A. 8th, 1901), 107 Fed. 827; *Lowell vs. Boston*, 111 Mass. 454. The States possess all powers of gov-

ernment not expressly prohibited to them except those delegated to the Federal Government. Yet the States cannot exercise unlimited powers of taxation and appropriation but their powers of taxation are limited by the scope of what might be called the substantive powers of the State, as distinguished from mere means of carrying them out. This illustrates the fundamental principle that the power to tax is never an end in itself, a substantive power of government, but only one of the mechanics of government. Hence, it is impossible to construe the scope of a power to tax[1] and appropriate without regard to the substantive powers of the Government of which the taxing power is an adjunct and to which the taxing power is always subordinate in the sense that it can only exist for and be exercised in their behalf. This much is clear as a matter of principle.

But no one will deny that the Federal Government is one of limited, delegated and enumerated powers. *Martin vs. Hunter's Lessee,* 1 Wheat. 304, 325; *Gibbons vs. Ogden,* 9 Wheat. 1, 198. Manifestly under our theory of government it cannot levy taxes and make appropriations for purposes outside of the powers delegated to it and in a field forbidden to it. Cf. *Binns vs. United States,* 194 U. S. 486. Were that not so, it could, by appropriating money and prescribing the purposes for and manner in which it should be used, just as effectively regulate internal affairs of the States as by setting up a system of regulations for such internal affairs and prescribing a tax for departures therefrom. And that cannot be done. *Child Labor Tax Case,* 259 U. S. 20, 38. Hence, the Hamilton theory cannot be sustained in principle.

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[1] We are here considering the scope of the purposes for which the power to tax may be exercised and not the extent of the objects which may be taxed or the amount of tax which may be levied for a proper purpose.

Moreover, any interpretation which results in converting the Federal Government from one of limited powers to one of unlimited powers is inadmissible. If the United States can appropriate for any purpose of general welfare (not limited to the scope of the enumerated powers), the Government is one of unlimited powers, and the power of taxation is an unlimited power. It would not be argued that the several States could tax for a private purpose or for a purpose admittedly inimicable to, rather than in furtherance of, the general welfare. Yet those States are Governments of unlimited powers within our definition of government. The fatal defect in the Hamiltonian construction is that it *does* convert a government of limited powers into one of unlimited powers. This defect in the Hamilton interpretation Hamilton and his supporters vainly struggled to overcome. They concede for instance that if the phrase "general welfare" is construed as authorizing a power to legislate, then it would convert the government into one of unlimited powers. *1 Story on the Constitution,* Sec. 909. But strangely enough it is argued that a power "to lay taxes and make appropriations for the general welfare" is not a general power of taxation but a limited power. *1 Story on the Constitution,* Sec. 922.

The Hamilton construction rests upon a so-called literal interpretation. It is based upon the theory that, although the power of taxation is not a substantive power but merely the provision of a means of carrying out substantive powers, that although it is not a purpose or end of government but merely the mechanics of government, nevertheless, in construing the scope and extent of a grant of the power to appropriate, we must close our eyes to the substantive powers of the Government which is to exercise such taxing power and construe the grant as embracing everything which might be taken to fall literally within the words, regardless of whether they fall within the powers and pur-

poses of the particular government. Such an interpretation cannot be sustained as a matter of principle. But the fallacy of the argument is also shown by other considerations. If, as originally proposed, the Tax Clause had been merely "to lay and collect taxes, duties, imposts and excises" (5 Elliot's Debates, 378) no one would have supposed that any power was granted to tax and make appropriations for any purposes other than in furtherance of the enumerated power. *1 Story on the Constitution*, Sec. 919. But if the argument, upon which the Hamilton construction must stand or fall (that is, that a grant of the taxing power must be construed without reference to the other and substantive powers of the Federal Government) is sound, then it would necessarily follow that the Tax Clause as originally proposed would have conferred upon the Federal Government power to levy taxes and make appropriations for purposes so wholly discretionary as to destroy all constitutional limitations on Federal power. Such literal construction leads to absurdities.

If the principle of construction relied upon in the Hamilton theory is right, then for illustration, the power "to constitute tribunals inferior to the Supreme Court" (Art. I, Sec. 8, Clause 9), empowers the Federal Government to establish State courts or even courts in Mexico or Italy. Of course, it is manifest that those powers which deal with the means of carrying out or administering the powers of regulation or government can only be judged and estimated by a consideration of the nature and powers of the Government to which they are appurtenant. The courts are a means of administering laws which the Government is entitled to promulgate. Yet no one would contend that the power to establish courts to administer such laws would enable the legislature to enact laws over subjects otherwise not within its jurisdiction. No more can a power to tax, which is likewise but a means of exercising the substantive

powers of Government, authorize an exercise of power not otherwise existing.

Again a literal consideration of the first ten Amendments would lead to the conclusion that they constitute restrictions upon every Government within the territorial jurisdiction of the United States. It was early contended that the first ten Amendments are operative alike upon Federal and State Governments. Of course, such a principle of construction is plainly inadmissible and in *Barron vs. Baltimore*, 7 Pet. 243, Chief Justice Marshall said with reference to this contention:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States *framed such a government for the United States* as they supposed best adapted to their situation, and best calculated to promote their interests. *The powers they conferred on this government were to be exercised by itself;* and the limitations on power, if expressed in general terms, are naturally, and, we think necessarily applicable *to the government created by the instrument.* They are limitations of power *granted in the instrument itself;* not of distinct governments, framed by different persons and for different purposes." (Italics added.)

If there could be any doubt as to the correct interpretation of the Tax Clause, it would be removed by the slightest consideration of the history of the Clause and of the adop-

tion of the Constitution. No one can doubt that the Federal Government was created as one of limited, delegated and enumerated powers. History establishes that both in the Constitutional Convention and throughout the compaign for ratification every provision of the Constitution was subjected to the most critical examination to make certain that the powers to be conferred upon the new central Government were strictly defined and limited within those expressly delegated and enumerated. What is the basis for supposing that the taxing power alone should not have been subjected to this examination and to these limitations? Why should we suppose that men who had just fought the Revolutionary War to rid the States of a super-government, largely because it claimed unlimited powers of taxation and appropriation, created a new Government with similarly unlimited powers of taxation and appropriation? Justice Story says that the framers of the Constitution intended that the new Government should "have powers of taxation coextensive with all constitutional objects and powers." (*1 Story on the Constitution*, Sec. 930.) Is it to be supposed that they wished it to have powers of taxation in excess of its "constitutional powers?" Why should it be supposed that they intended to create the anomaly in American politics of a Government with powers of taxation and appropriation far in excess of the powers of regulation and government which it should possess?

The implication of the words just quoted from Mr. Justice Story is so obviously at variance with the Hamilton construction, that the Justice seems to have felt the necessity of trying to avoid it. So he added this sentence:

> "In other words, it conformed to the spirit of the Resolution of the Convention which authorised Congress 'to legislate, in all cases, for the general in-

terests of the Nation.'" (*1 Story on the Constitution*, 682.)

Now that would be tantamount to the original Hamilton proposal that the New Congress should have all powers not thereafter negatived. It would have been the equivalent of a grant of general legislative power which Mr. Justice Story, after exhaustive historical review, had conclusively shown not to have been intended and to have been expressly rejected by the Convention. Moreover, as Mr. Madison points out, 126 Amedments were proposed by the various States, all looking to a strict confinement of the Federal power within those expressly enumerated and delegated. Every proposal looked to a limitation and not to an enlargement of Federal powers. It is unthinkable that the later Hamilton construction could have been thought possible or the Constitution accepted in that understanding. History establishes beyond doubt the understanding of the people that the power of taxation and appropriation was limited to the furtherance of the powers delegated to the central Government by the Constitution.

The only other argument advanced in favor of the Hamilton or literal construction is that the Madison construction renders the words "provide for the common defense and general welfare of the United States" mere surplusage. What has already been said would seem to deprive this criticism of any weight. But it is also disposed of by other considerations. The origin of the words is not involved in doubt. The words "to pay the debts of the United States" were first added at the insistence of those who were concerned about the credit of the new country. The reason for adding these words was their fear that otherwise the new Government might be disabled from paying the debts which had been incurred by the old Confederation. *5 Elliot's Debates*, 451. This was thought by some

to make it necessary to add something to prevent an inference that the Congress had no power of taxation or appropriation to carry out the other enumerated powers of Government. Hence, the words of the old Article of Confederation, to-wit: "to provide for the common defense and general welfare" were added. No one thought these words were necessary or desirable until those anxious about the debts of the old Confederation succeeded in adding the phrase "to pay the debts of United States." It is, therefore, manifest that the general welfare phrase was added with no thought of creating any new power of legislation, taxation or appropriation, but merely to make clear that the power of taxation and appropriation was coextensive with the delegated powers of the Federal Government. Manifestly, it never occurred to any one that these words dealing with the power of taxation which represented only the means of performing the substantive functions of Government could be construed either as conferring legislative power or enlarging the taxing power.

It is believed that another motive was also involved. It is conceded that the phrase is a restriction on the taxing power and not a separate granted power. *1 Story on the Constitution,* Secs. 908, 909. It is conceded that if the taxing clause had read as originally proposed, to-wit, "to lay and collect taxes, duties, imposts and excises," the powers of taxation and appropriation would have been limited to the furtherance of the delegated powers of Government. If the addition of the words in controversy was a limitation upon the taxing power, by what process of reasoning can we conclude that it enlarged the field of taxation and appropriation? On the contrary, did it not result in fact in restricting the power of taxation and appropriation so that taxes and appropriations had not only to be in furtherance of some of the delegated powers but also for the general welfare? There is good reason to believe that this is so.

One of the great fears of the framers of the Constitution and particularly of the people who adopted the Constitution, was that there should be vested in the Federal Government some power to levy taxes and make appropriations in a manner discriminatory between the various States and the various sections of the country. Many provisions in the Constitution can be traced directly to an effort to make such action impossible. (See Art. I, Sec. 8, Clause 6, Clause 9.) Even as construed by Hamilton and Story, a concept of the general welfare clause was that appropriations had to be for purposes national not State, general not local. *(1 Story on the Constitution*, Sec. 922. Is it not a fact that many appropriations may be made in furtherance of various enumerated powers, which in truth are State not national, local not general? Was not this limitation on appropriations even for the carrying out of the enumerated powers the purpose to be accomplished? We believe that the sense in which the Constitution was framed by the Convention and adopted by the people was that the power of taxation and appropriation is limited to the furtherance of the other delegated powers of the Federal Government. For that reason and the additional reasons hereinbefore stated, we think no other construction of the taxing clause is admissible.

A supposed practice of Congress is frequently urged in support of a contention that the taxing clause should be construed to authorize appropriations for purposes not within the enumerated powers of the Federal Government. It will be found that such appropriations, in fact, were generally rested upon some express power; but in any event, it is settled that legislative and executive practice, no matter how long continued, repeated and generally unquestioned, cannot be followed against "a conviction that such legislation is clearly incompatible with the supreme law of

the land." *Field vs. Clark,* 143 U. S. 649, 691; *Maynard vs. Hill,* 125 U. S. 190, 204; *Fairbank vs. United States,* 181 U. S. 283, 306-311. This principle applies with peculiar force to questions of appropriations because generally citizens not benefited by the unconstitutional appropriation have no means of challenging them. As said by the court in *Miles Planting Co. vs. Carlisle,* 5 Appeal Cases, District of Columbia, 138 at page 161:

> "All such acts, however, no matter how worded or devised, have met with determined opposition and denial of power at all times; and it cannot be said that they have ever received general consent or acquiescence. The fact that money have often been paid out under acts of doubtful or questionable validity can have no great weight, under a system where the question, by reason of difficulties before alluded to, is so hard to be raised in an effective manner.
>
> But if there had been a practice by Congress, uniform and generally acquiesced in, our opinion is so clearly against the validity of this act that we could not be controlled by it in the performance of our duty. No time, no acquiescence, no estoppel runs against the people under the protection of our written Constitution."

* * * * * * *

ADDENDUM I.

(General Welfare Opinion)

Summary review of early opinion on the meaning and scope of the phrase "General Welfare" in Article I. Section 8, Clause 1, of the Constitution.

On February 15, 1791, Jefferson rendered an Opinion on the Constitutionality of the First Bank of the United States in which he said:

"To lay taxes, to provide for the general welfare of the United States is to lay taxes for the *purpose* of providing for the general welfare. For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised. Congress are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

"It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil; it would be also a power to do whatever evil they please.

"It is an established rule of construction where a phrase will bear either of two meanings, to give it

that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. *It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect.*" (*The Writing of Thomas Jefferson*, Library Edition, 1903, Vol. III, p. 148.)

The foregoing quotation from Jefferson's Opinion has been urged in support of both interpretations. Judge Story seems to regard it as supporting the Hamilton interpretation (*1 Story on the Constitution*, 677), but he concedes that in his Message to Congress of December 2, 1806 and also in his correspondence, Jefferson adopted the opposite or Madison interpretation. (*1 Story on the Constitution*, 727; *Wait's State Papers* 457, 458; *4 Jefferson's Correspondence*, 457.) Jefferson's general attitude would seem to confirm those who interpret his Opinion as favorable to the Madison construction.

In the Virginia Resolutions of January 8, 1800, it is said that:

"• • • whether the phrases in question are construed to authorize every measure relating to the common defense and general welfare, as contended by some, or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution. For it is evident that there is not a single power whatsoever which may not have some reference to the common

defence or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve or admit an application of money. The government, therefore, which possesses power in either one or the other of these extents, is a government without limitations, formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration are destroyed by the exposition given to these general phrases. • • • Congress is authorized to provide money for the common defence and general welfare. In both is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in the Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution, which declares that no money shall be drawn from the treasury but in consequence of appropriations by law. An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction." (*1 Story on the Constitution,* 669-670.)

In December 1817, Henry St. George Tucker in a Report made in behalf of a Special Committee of the House of Representatives, said in part:

"There is, perhaps, no part of the Constitution more unlimited than that which relates to the application of the revenues which are to be raised under its authority. * * * It would be difficult to reconcile either the generality of the expression, or the course of administration under it, with the idea that Congress has not a discretionary power over its expenditures, limited only by their application 'to the common defense and general welfare.'"

* * * *

"There is a distinction between the power to appropriate money for a purpose, and the power to do the act for which it is appropriated; and, if so, the authority to appropriate money 'for the general welfare' does not, by fair construction, extend the specified or incidental powers of Government." (*Am. St. Papers,* Misc. II, 443, 447.)

In February 1817, John C. Calhoun, speaking in the House of Representatives in support of the Bank Bonus Bill which provided for the segregation of the profits from the recently chartered National Bank as a permanent fund pledged to internal improvements, and arguing that the Bill was supported both by the Tax and Postal Clause said in part:

"If the framers had intended to limit the use of the money to the powers afterwards enumerated and defined, nothing could be more easy than to have expressed it plainly. * * * Our laws are full of instances of money appropriated without any reference to the enumerated powers. * * * If we are restricted in the use of our money to the enumerated powers, on what principle, said he, can the purchase of Louisiana be justified? * * * To look no further back, at the last session a considerable sum was granted

to complete the Cumberland Road. • • • He introduced these instances to prove the uniform sense of Congress, and the country (for they had not been objected to), as to our powers; and surely, said he, they furnish bettter evidence of the true interpretation of the Cohstitution, than the most refined and subtle arguments." *(Benton, Abridgement,* V. 706. 707.)

President Madison vetoed the Bonus Bank Bill for Internal Improvements on March 3, 1817, and in the course of his veto message said:

"A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution." *(Messages and Papers of the President,* Vol. I, p. 585.)

Finally former President Madison in a letter addressed to Andrew Stevenson, Speaker of the House of Representatives, under date of November 27, 1830, reviewed the whole history of the Tax Clause, pointed out that the words "to pay the debts of United States" had been finally added at the insistence of those concerned about the credit of the young country, that this seemed to make it necessary to add something to prevent an inference that the Congress had no power of taxation or appropriation to carry out the other enumerated powers of the Government, and that to supply this deficiency the words of the old Articles of Confederation, to-wit, "to provide for the common defense and general welfare" were added. Mr. Madison points out that not only in the Convention but throughout the cam-

paign for ratification every provision of the Constitution was subjected to the most critical examination from the standpoint of making certain that the powers of the central Government were limited to those enumerated, that 126 Amendments were proposed by the various States, all looking to that end, that no Amendment was proposed to meet the interpretation later advanced by Hamilton. This, Madison argued, established beyond doubt the understanding of the people that the power of taxation and appropriation was limited to the furtherance of the powers delegated to the central Government by the Constitution. Mr. Madison said in part:

"No less than seven States, it appears, concurred in adding to their ratifications a series of amendments which they deemed requisite. Of these amendments, nine were proposed by the convention of Massachusetts, five by that of South Carolina, twelve by that of New Hampshire, twenty by that of Virginia, thirty-three by that of New York, twenty-six by that of North Carolina, and twenty-one by that of Rhode Island.

"Here are a majority of the States proposing amendments, in one instance thirty-three by a single State; all of them intended to circumscribe the power granted to the general government, by explanations, restrictions, or prohibitions, without including a single proposition from a single State referring to the terms 'common defence and general welfare'; which, if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range than all the powers objected to put together. And that the terms should have passed altogether unnoticed by the many eyes which saw danger in terms and phrases employed in some of the most minute and

limited of the enumerated powers, must be regarded as a demonstration that it was taken for granted that the terms were harmless, because explained and limited as in the 'Articles of Confederation,' by the enumerated powers which followed them.

"A like demonstration, that these terms were not understood in any sense that could invest Congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of Congress, when the subject of amendments was taken up, with the conciliatory view of freeing the Constitution from objections which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not only were the terms 'common defence and general welfare' unnoticed in the long list of amendments brought forward in the outset, but the Journals of Congress show, that in the progress of the discussions, not a single proposition was made in either branch of the legislature which referred to the phrase as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forbearance and silence on such an occasion, and among so many members, who belonged to the part of the nation which called for explanatory and restrictive amendments, and who had been elected as known advocates for them, cannot be accounted for without supposing that the terms 'common defence and general welfare' were not, at that time, deemed susceptible of any such construction as has since been applied to them." (Quoted in footnote *1 Story on the Constitution* 685-686.)

Then Mr. Madison took special note of the attempt of those supporting the Hamilton construction to avoid the

clearly inadmissible result of creating a Government of unlimited powers by differentiating between the power to appropriate money under the general welfare phrase for purposes outside of the enumerated powers and the power to legislate under that phrase for purposes outside of the enumerated powers. To show that this argument could not save the Hamilton construction from the fatal defect of in fact creating a Government of unlimited powers and that it was also without support in any of the proceedings of the Convention, Mr. Madison appended a note to his letter to Speaker Stevenson (*Writings of James Madison*, IX, pp. 424-431). In this connection, Mr. Madison said in part:

> "3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defense and general welfare.'"

Under date of July 11, 1832, Ex-President John Quincy Adams wrote a letter to Speaker Stevenson in reply to Madison's letter of November 27, 1830. In that letter former President Adams said in part:

> "I have distinctly said that I do not hold the words common defense and general welfare in the Constitution, to contain a grant of substantive and indefinite power, or indeed of any power at all—but as expositions of the purposes for which Congress are expressly enjoined to provide, and for enabling them to provide for which they are armed with the power of taxation in almost all its forms; and so un-

derstanding them, I believe it would be very imperfectly descriptive of their character, to denominate them harmless words, and a very inadequate estimate of their import to consider them as merely auxiliary to other enumerated powers."

In President Monroe's first Message to Congress on March 4, 1817, he endorsed the Madison construction. (*Edward S. Corwin, Spending Power of Congress,* 36 Harvard Law Review, 548, 559-560.) However, on May 4, 1822, in connection with his veto of a bill "For the Preservation and Repair of the Cumberland Road," President Monroe transmitted a paper entitled "Views of the President of the United States on the Subject of Internal Improvements." In this paper President Monroe said in part:

"It is contended on the one side that as the National Government is a government of limited powers it has no right to expend money except in the performance of acts authorized by the other specific grants according to a strict construction of their powers; that this grant in neither of its branches gives to Congress discretionary power of any kind, but is a mere instrument in its hands to carry into effect the powers contained in the other grants. To this construction I was inclined in the more early stages of our Government; but on further reflection and observation my mind has undergone a change, for reasons which I will frankly unfold" (p. 164).

"My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not State, benefit." (*Richardson, Messages and Papers of the Presidents,* II, 164, 173.)

In a message of May 3, 1854, vetoing "An Act making a grant of public lands to the several States for the benefit of indigent insane persons," President Franklin Pierce said with reference to the taxing clause:

> "I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive."

In February 1859, President Buchanan, in vetoing a Bill granting public lands to the several States on condition that they provided not less than one College, said:

> "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective States." *(16 Harvard Law Review,* 571.)

President Buchanan then turned his attention to the claim that the constitutionality of the Bill was supported by the power of Congress "to dispose * * * of the territory and other property of the United States," and said:

> "It would be a strange anomaly, indeed, to have created two funds—the one by taxation, confined to the execution of the enumerated powers delegated to Congress, and the other from the public lands, ap-

plicable to all subjects, foreign and domestic, which Congress might designate; that this fund should be 'disposed of,' not to pay the debts of the United States, not 'to raise and support armies,' not 'to provide and maintain a navy,' nor to accomplish any one of the other great objects enumerated in the Constitution, but be diverted from them to pay the debts of the States, to educate their people, and to carry into effect any other measure of their domestic policy. This would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution. The natural intendment would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation in respect to the public lands." (*16 Harvard Law Review*, p. 571.)

The foregoing may perhaps be said to constitute a summary review of the principal opinions expressed by American Statesmen upon the Federal power of taxation and appropriation up to the Civil War. We now consider briefly the Commentaries of the early Jurists and Scholars upon this clause of the Constitution.

Mr. Justice Story in his Commentaries on the Constitution of the United States, published in 1833, indulges in an extended historical review and discussion of the Tax Clause. (*1 Story on the Constitution* (5th Ed.), 661-762.) Justice Story concludes that the Tax Clause empowers the Con-

gress to lay taxes for any purpose so long as it promotes the general welfare although not within the scope of the other enumerated powers, and that since the power of appropriation is implied from the taxing power, that power is equally broad. Story argues in part that the power of taxation and appropriation could not have been implied from the other enumerated powers and that on the other hand, the power of taxation and appropriation alone would not carry with it all of the other enumerated powers or enable their exercise. He therefore argues that the tax power and the other powers must be entirely separate and neither in any way limited by the other. (*1 Story*, Sec. 922.) The Conclusion is believed to be wholly *non sequitor* as will hereinafter be more particularly pointed out. In arguing that the congressional power of appropriation is limited only by the general welfare (which argument, however, is based upon the precarious premise that the power of taxation, from which the power of appropriation comes, is similarly unlimited), Mr. Justice Story said at page 675:

"• • • The only real question is, whether, even admitting the power to lay taxes is appropriate for some of the purposes of other enumerated powers (for no one will contend that it will, of itself, reach or provide for them all), it is limited to such appropriations as grow out of the exercise of those powers. In other words, whether it is an incident to those powers, or a substantive power in other cases, which may concern the common defense and the general welfare. If there are no other cases which concern the common defence and general welfare, except those within the scope of the other enumerated powers, the dicussion is merely nominal and frivolous. If there are such cases, who is at liberty to say that, being for the common defence and general wel-

fare, the Constitution did not intend to embrace them?"

At pages 681-682 of his Commentaries, Mr. Justice Story further says:

"The truth is, as the historical review also proves, that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution, and a desire has been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay *taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the Constitution.* Among these none were more appropriate than the words 'common defence and general welfare,' found in the Articles of Confederation, and subsequently with marked emphasis introduced into the preamble of the Constitution. To this course no opposition was made, because it satisfied those who wished to provide positively for the public debts, and those who wished *to have the power of taxation coextensive with all constitutional objects and powers.*"

While there can be no doubt that Justice Story voiced the conclusion that the congressional power of taxation and appropriation is limited only by the general welfare, the foregoing quotation from Justice Story's conclusions after a review of the history of the provision certainly lends substantial support to those who believe that the power of taxation and appropriation under the Constitution is limited to the furtherance of the enumerated powers.

Several modern writers upon Constitutional Law have stated the congressional power of taxation and appropria-

tion to be in accord with the view expressed by Mr. Justice Story. The works of these writers are largely devoid of any analysis of the origin of the clause or its proper interpretation. So far as the subject is treated beyond the scope of a mere bald statement, the conclusion is largely if not entirely rested upon a reference to Mr. Justice Story and a supposed practice of the Congress. *Pomeroy, Introduction to Constitutional Law,* Sec. 274, 275; *Hare, American Constitutional Law,* 245, 246; *Willoughby on the Constitution,* Sec. 269; *Burdick, On the American Constitution,* Sec. 277; *Watson on the Constitution,* 382-398. However, it may be said that Hare, for illustration, appears to be doubtful about the soundness of the Hamilton construction and the supposed existing practice. *Hare, American Constitutional Law,* Vol. I, 242-243. See also *Edward S. Corwin, The Spending Power of Congress,* 36 Harvard Law Review, 548, 582.

Mr. John Randolph Tucker in his Treatise on the Constitution, after stating the conflicting views of Madison and Hamilton, says:

> "It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the government. It is argued everywhere in the Federalist that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by

taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect; which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation."

* * * *

"If, under the Tenth Amendment of the Constitution, a specific power to do a particular thing is not delegated to the United States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and discretion of the United States. If it be within the words 'common defense and general welfare,' still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power — a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition 'to legislate in all cases for the general interests of the Union.' But that proposition was never adopted, and was rejected. Is it legiti-

mate, then, to conform the construction of the words 'to provide for the common defense and general welfare' to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have 'power to pass all laws whatsoever, subject to the negative hereafter mentioned,' and that the President should have power to negative all laws passed in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that 'the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.' But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress."

* * * * *

"If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the tenth Amendment or for Article I, Sec. 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power. Taxation is a great power; but in itself it does nothing except as it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited dis-

cretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to the States. The effect then would be that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and conditioning the expenditure of money upon the substantial concession of power would, through money, virtually absorb the autonomy of the States and consolidate the whole Governmental system into centralism." (*John Randolph Tucker on the Constitution*, Vol. I, pp. 478-480.)

Mr. Justice Samuel F. Miller, who was an Associate Justice of the Supreme Court of the United States from 1862 to 1890 says in his "Lectures on the Constitution of the United States," at page 247:

"The United States being a limited form of government, *one of the restrictions to which it is subject is in regard to its power to levy taxes.* The states may levy them for a great many purposes *for which Congress cannot,* because to the States belong all the powers not delegated to Congress. Hence, while the Constitution of the United States has nowhere been amended by any limitations of its taxing power, there has scarcely been a state constitutional con-

vention in half a century that has not imposed some restrictions upon the power of the State to levy taxes."

In a speech in the Senate, Senator John T. Morgan quoted the following from an address delivered by Mr. George Ticknor Curtis before the Law School of Georgetown University in February, 1886:

"Looking into the body of the instrument we come upon the first clause of the eighth section of Article I of the Constitution, which contains the grant of the taxing power. Here the words general welfare are used again; and strange to say, there are persons who suppose that this clause contains a grant of authority to tax, in order to promote the personal welfare of every man, woman and child in the United States! I shall merely counsel you to analyze the clause and see how strange this notion is. The clause grants to the Congress a power to tax the people for three special purposes: First, to pay the debts of the United States; second, to provide, for the common defense of the United States; third, to provide for the general welfare of the United States.

"In every one of these special purposes for which the taxing power is to be exercised, 'the United States' means the political corporation known as the United States, and not the individual inhabitants of the country. The debts that are to be paid are the debts of the Government; the common defense that is to be provided for is the defense of the Government in all those matters it has duties of defense to discharge for the whole country; the general welfare that is to be provided for is the well-being of the Government in all those matters of which it has special cognizance and in respect to which its efficiency

concerns the whole Union. In the very next clause which contains the grant of power to borrow money on the credit of the United States, the 'United States' is used in the same sense, meaning the Government known as the United States. It is on the credit of the Government, not on the credit of individuals or of States, that Congress is authorized to borrow money." (*Congressional Record*, Vol. 17, Part 2, p. 1439.)

ADDENDUM II.

(General Welfare Opinion)

Further arguments deemed to support the conclusions reached.

I.

Assuming Congress to have the power to make appropriations for purposes deemed to be for the general welfare of the United States although not within the enumerated powers of the Federal Government, it may not appropriate for purposes, local not general, state not national, or private not public; and hence, the National Industrial Recovery Act in this aspect would nevertheless be unconstitutional.

Even those who have contended that the power of Congress to tax and appropriate extends to all purposes deemed to be for the general welfare of the United States, although not embraced by the enumerated powers delegated to the Federal Government, concede that a tax or appropriation to fall within the constitutional powers must be "of general not local, National not State, benefit." *President Monroe, Richardson, Messages and Papers of the Presidents*, II,

173; *Hamilton, Hamilton's Works* (Const. Ed.) Vol. IV, 152; *1 Story on the Constitution,* Sec. 922.

Some things are in their very nature inherently *local.* They remain matters of strictly local concern although similar local objects may exist in every community in United States. Even under the Hamilton construction of the tax clause, these may not constitutionally be made the object of Federal appropriations. The Federal Government by a mere multiplication of its excursions into matters of strictly local concern cannot convert them into matters of *National concern or general welfare,* and hence, constitutional objects of Federal appropriations.

Thus for illustration, the provision of sidewalks, municipal parks, city halls, and comfort stations are inherently and inescapably objects of local concern. They would not be made matters of National concern or general welfare merely by a congressional proposal to build them in every community in the land. The same is inescapably true of a local utility in a municipality. The power to appropriate is admittedly implied from and subject to the same limitations as the power to tax. *1 Story on the Constitution,* Sec. 976. Hence the appropriation and gift seem clearly bad as in furtherance of an object local and not general.

Furthermore, under the Hamilton construction, a constitutional appropriation must be for a purpose National not State. In order to constitute a valid tax, the purpose must, in every instance, pertain to the taxing sovereignty. The principle is well stated by Judge Cooley in *Cooley on Taxation* at page 108, as follows:

> "In considering the legality of the purpose of any particular tax, a question of first importance must always concern the grade of the government which assumes to levy it. The 'public' that is concerned in a legal sense in any matter of government

is the public the particular government has been provided for; and the 'public purpose' for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. There may, therefore, be a public purpose as regards the Federal Union, which would not be such as a basis for State taxation, and there may be a public purpose which would uphold State taxation, but not the taxation which its municipalities would be at liberty to vote and collect. *The purpose must in every instance pertain to the sovereignty with which the tax originates;* it must be something within its jurisdiction so as to justify its making provision for it. The rule is applicable to all the subordinate municipalities; they are clothed with powers to accomplish certain objects, and for those objects they may tax, but not for others, however interesting or important, which are the proper concern of any other government or jurisdiction. *State expenses are not to be provided for by Federal taxation,* nor Federal expenses by State taxation, because in neither case would the taxation be levied by the government upon whose public the burden of the expenses properly rests. To provide for such expenses would consequently not be a purpose in which the people taxed would in a legal sense be concerned. This is the general rule; some apparent exceptions there unquestionably are, where the nation and the state have common interests and a common duty, such as may require the action of both, and would justify the levy of a tax by either or both to accomplish the one object. An illustration would be the case of a tax for the common defense against the public enemies,

which might be levied by each, because the purpose would, in a strict sense, be public as to both."

Thus a local tax cannot be laid for a State-wide purpose although special local benefits accrue. *Hubbard vs. Fitzsimmons,* 57 O. St. 436, 49 N. E. 477. "A State-wide tax could only be levied for State-wide purposes and so on down to the smallest taxing district." *State ex rel: Owen, Atty. Gen. vs. Donald, Secretary of State,* 160 Wis. 21, 151 N. W. 331, 365 (1915). "Congress may levy and collect taxes for the legitimate purposes of the National Government, but not for the purposes of State Governments." *Cloud etc. vs. Coleman etc.,* 64 Ky. 548, 588 (1866). The same principle governs the taking of property by taxation and by eminent domain (*Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112, 161); and the Federal Government may not take property by eminent domain for a public purpose unless it be also a national purpose. *Kohl vs. United States,* 91 U. S. 367.

Hence, it would not be supposed that Congress could appropriate sums of money to pay 30% of the police force in each of the cities and villages of the United States, or 30% of the street cleaners. While the law might be operative throughout the United States, clearly so far as that law would have any legitimate purpose, the purpose would be a State and not a National one. The same conclusion must follow in the case of a local municipal utility. It has been argued that, conceding the construction and operation of municipal utilities to be a matter of local and not national concern, a matter State not National, the circumstance that their construction may provide some employment for labor at a time of national unemployment, makes the appropriation and gift of money for their construction as distinguished from the construction itself a matter of national concern and general national welfare. *Missouri*

Utilities Co. vs. City of California, Missouri, Unreported Opinion, pp. 23-24. The same may be said of a proposal to make a gift of Federal funds to provide for hiring a farm hand for every farmer and a gardener for every urban dweller in the United States. Yet it is submitted that such matters would remain inescapably local. The argument involves the same fallacy which attempts to convert every private grant of public funds into a public purpose on the theory that incidental advantages will flow to the public. Yet it is settled that it is the essential character of the direct object of the expenditure which must determine its validity and not the incidental consequences. *Lowell vs. Boston, 111 Mass.* 454, 461 (1873). Moreover as said by Mr. Justice Brewer while a member of the Supreme Court of Kansas, taxes may not be laid and appropriations made for a forbidden purpose by yoking them to a proper purpose and where that is attempted in a single concession, the former will vitiate rather than the latter uphold the grant. *Central Branch U. P. R. Co. vs. Smith,* 23 Kans. 745, 533.

* * * * * * *

A third limitation upon the Hamilton interpretation is that taxation and appropriations in furtherance of a private rather than a public purpose is beyond the constitutional power of the Congress. To lay taxes for private purposes is to take property without due process of law. The same limitation applies to appropriations of tax moneys. This limitation upon the power of taxation and appropriation applies even to States exercising general legislative power. In *Cole vs. City of La Grange,* 113 U. S. 1 (1885), Mr. Justice Gray said at page 6:

> *"The general grant of legislative power in the constitution of a State does not enable the Legislature, in the exercise* either of the right of eminent domain or *of the right of taxation, to take private property, without the owner's consent, for any but a*

public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

"In *Loan Ass'n vs. Topeka,* 20 Wall. 655 (87 U. S. XXII, 455), bonds of a city, issued, as appeared on their face, pursuant to an Act of the Legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in *Parkersburg vs. Brown,* 106 U. S. 487 (XXVII, 238). The decisions in the courts of the States are to the same effect. *Allen vs. Jay,* 60 Me. 124; *Lowell vs. Boston,* 111 Mass. 454; *Weismer vs. Douglas,* 64 N. Y. 91; *In re Eureka Co.,* 96 N. Y. 42; *Bissell vs. Kankakee,* 64 Ill. 249; *English vs. People,* 96 Ill. 566; *R. R. Co. vs. Smith,* 23 Kan. 745."

In *Green vs. Frazier,* 253 U. S. 233, Mr. Justice Day said at page 238:

"The due process of law clause contains no specific limitation upon the right of taxation of the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes. *Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112, 155."

The same principle is laid down in *Loan Association vs. Topeka*, 87 U. S. (20 Wall.) 655; *Olcott vs. The Supervisors*, 83 U. S. 678 (1872, Strong, J.); *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112 (1896, Peckham, J.); *Traction Co. vs. Mining Co.*, 196 U. S. 239 (1904, Harlan, J.); *Jones vs. City of Portland*, 245 U. S. 217 (1917, Day, J.); *Dodge vs. Mission Township*, 107 Fed. 827 (C. C. A. 8th, 1901).

These limitations have been enforced upon the State taxing power under the due process clause of the Fourteenth Amendment. It would seem axiomatic that the due process clause of the Fifth Amendment must constitute a similar limitation upon the Federal taxing power. It has sometimes been said that the Federal taxing power is not restricted by the due process clause of the Fifth Amendment. *Billings vs. United States*, 232 U. S. 261. It would seem manifest that such a holding could only relate to a tax challenged as confiscatory because too high and not to a tax challenged as confiscatory because it was levied for a purpose, or in a field, beyond the constitutional power of the Federal Government, and it is now held that the due process clause of the Fifth Amendment is a restriction upon the Federal taxing power. *Nichols vs. Coolidge*, 274 U. S. 531, 542; *Blodgett vs. Holden*, 275 U. S. 142, 147; *Burnet vs. Brooks*, 288 U. S. 378, 401; *Neuss, Hesslein & Co. vs. Edwards, Collector*, 30 Fed. (2d) 620, 621. And in *Miles Planting Co. vs. Carlisle*, 5 App. Cas. Dist. Col. 138 (1895), the court, in holding that the appropriation of Federal funds to pay a bounty to producers of sugar was unconstitutional as an appropriation for a private and not a public purpose, said in part at page 157:

> "If then, as we have seen from the cases cited, the legislature of a State has no implied power to grant subsidies or bounties to individuals, though, in

a sense, the general welfare may be promoted thereby, *a fortiori* the Congress of the United States has no such power."

We come then to the question whether the appropriation of the Federal funds to build local municipal utilities is, from the national point of view, a public or a private purpose. That question may be answered by a consideration of a few well established principles. In *Miles Planting Co. vs. Carlisle, supra* (Loc. Cit. 158), the court said:

"We think the authorities cited above establish beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of revenues to be derived therefrom, for a private purpose."

In *Dodge vs. Mission Township,* 107 Fed. 827 (C. C. A. 8th, 1901) Sanborn, C. J., said at page 830:

"Speaking generally, a public purpose is a *governmental purpose,* one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization."

In *Lowell vs. Boston*, 111 Mass. 454 (1873), the court said at pages 460-461:

> "The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

In *State ex rel. Owen, Atty. Gen. vs. Donald, Secy. of State*, 160 Wis. 21, 151 N. W. 331 (1915), Judge Marshall said at page 365:

"It is a maxim of the law that the power to appropriate is co-extensive with the power to tax and so has fundamental and inherent limitations.

"The first of such limitations is implied from the very nature of organized society. That exists for public purposes of a governmental character. The scope of such purposes, it must be conceded, except as expressly or by necessary implication fundamentally limited, is quite broad.

"It follows that we need not necessarily depend on any fundamental limitations of the power to tax. There would be such if we had no constitution. Then, a tax could not properly be levied to take property from one person and give it to another."

To the effect that a public purpose means a governmental purpose and that the tax must affect inhabitants as a community and not merely as individuals, see *Stanley vs. Jeffries*, 86 *Mont.* 114, 284 Pac. 134; *Stevenson vs. Port of Portland*, 82 Ore. 576, 162 Pac. 509 (1917). The circumstance that a proposed expenditure would indirectly benefit the community through increased taxable values, enhancement of property values generally and increased employment and the like does not constitute a public purpose. *Loan Ass'n vs. Topeka*, 87 U. S. (20 Wall.) 655, 665 (1874); *Eyers Woolen Co. vs. Town of Gilsum*, 84 N. H. 1, 146 Atl. 511; *Bolton vs. Wharton*, 163 So. Car. 242, 161 S. E. 454, 457; *In re Opinion of Judges* (So. Dak.) 240 N. W. 600.

* * * * * * *

From the cases hereinbefore cited, it is apparent that such supposed collateral and indirect advantages do not constitute a public purpose so as to create a situation where public and private purposes are mingled. Yet even where an admitted public purpose is mingled with a private purpose, the tax or appropriation is nevertheless invalid. *Cen-*

tral Branch U. P. R. Co. vs. Smith, 23 Kans. 525, 533 (1880); *Whiting vs. Sheboygan etc. R. R. Co.*, 25 Wis. 167, 180; *People vs. Parks*, 58 Cal. 624, 639. In *Central Branch U. P. R. Co. vs. Smith, supra*, Mr. Justice Brewer, then a member of the Supreme Court of Kansas said at page 533:

> "Public aid to private purposes cannot be secured by yoking them to a public purpose. And where the public and private purposes are attempted to be aided by a single concession, the latter vitiate rather than the former uphold the grant."

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Nos. 55, 56, and 57

In the Supreme Court of the United States

OCTOBER TERM, 1935

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION OF MILWAUKEE, ET AL., PETITIONERS

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN

RELIANCE BUILDING AND LOAN ASSOCIATION, PETITIONER

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

NORTHERN BUILDING AND LOAN ASSOCIATION, PETITIONER

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, CONSTITUTING THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 55

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION of Milwaukee et al., petitioners

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, Constituting the Banking Commission of the Banking Department of the State of Wisconsin

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No. 56

RELIANCE BUILDING AND LOAN ASSOCIATION, petitioner

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, et al.

No. 57

NORTHERN BUILDING AND LOAN ASSOCIATION, petitioner

v.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, et al.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

STATEMENT

These causes may require a determination as to whether Section 5 (i) of the Home Owners' Loan Act of 1933 (48 Stat. 128, as amended by 48 Stat. 646; 12 U. S. C. A. 1464 (i)) is a valid exercise of the constitutional powers of Congress. This brief *amicus curiae* is filed because such a determination will affect the interests of the United States in that it will have a direct bearing upon the success of a declared policy of Congress, and seriously affect an investment which the United States has made in shares of the Federal savings and loan associations whose creation is authorized by Section 5 of the Home Owners' Loan Act of 1933.

For a statement of the essential facts the Court is respectfully referred to the statement contained in petitioners' brief, pp. 7–11.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 N. W. 684. The official report of the State of Wisconsn has not yet been published.

JURISDICTION

Appeals from the Supreme Court of the State of Wisconsin to this Court were dismissed for want of jurisdiction and treated as applications for writs of certiorari, which were granted June 3, 1935 (R. No. 55, p. 71; R. No. 56, p. 69; R. No. 57, p. 70). The jurisdiction of this Court is invoked under Section 237 (b) (c) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. 344.)

QUESTIONS PRESENTED

Each of the three causes presents the following questions:

1. Should Section 5 (i) of the Home Owners' Loan Act of 1933 (June 13, 1933, c. 64, 48 Stat. 128, Sec. 1, as amended April 27, 1934, c. 168, 48 Stat. 646, Sec. 6; 12 U. S. C. A. 1464 (i)), be construed as authorizing a Wisconsin building and loan association to convert itself into a Federal savings and loan association without the consent of the State of Wisconsin; and

2. If that question is answered in the affirmative, is Section 5 (i), so construed, a valid exercise of the constitutional powers of the Congress?

STATUTES INVOLVED

Section 5 of the Home Owners' Loan Act of 1933, as amended (48 Stat. 128, 646), and the Federal Home Loan Bank Act, as amended (47 Stat. 725; 48 Stat. 128, 643, 1261), are set forth in Appendices A and B of the petitioners' brief (pp. 62–96).

SUMMARY OF ARGUMENT

I

Section 5 (i) of the Home Owners' Loan Act of 1933, as its language and its legislative history plainly show, should be construed as authorizing a member of a Federal Home Loan Bank to convert itself into a Federal savings and loan association without the consent of the State under whose laws

it is organized. In other statutes Congress has used explicit language when it intended that conversion into a Federal corporation should take place in compliance with state law, and the absence of such language in Section 5 (i) shows that Congress did not intend to require such compliance or the consent of the State. The decision of this Court in *Casey* v. *Galli*, 94 U. S. 673, construing a similar provision in the National Bank Act of 1864, establishes that this construction is correct.

II

Section 5 (i) is a lawful exercise of the fiscal powers of Congress. In the exercise of those powers Congress can provide for a national credit and currency system and it can strengthen and preserve Federal fiscal institutions established for that purpose. *McCulloch* v. *Maryland*, 4 Wheat 316; *Osborn* v. *U. S. Bank*, 9 Wheat 738; *Farmers etc. National Bank* v. *Dearing*, 91 U. S. 29; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180. The Federal Home Loan Banks and the Federal savings and loan associations were created by Congress to strengthen the national currency and credit system and to protect established Federal fiscal institutions. Furthermore, Congress has power to create appropriate corporate agencies to aid in the execution of its fiscal powers, and Federal savings and loan associations are such agencies. They are authorized to act as fiscal agencies of the Government,

and are closely related to the Federal Home Loan Banks, which also act as such agencies and as depositaries of public money. Moreover the functions of Federal savings and loan associations are similar to those of the Federal Land Banks, whose constitutionality was established by the decision of this Court in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180.

III

The creation of Federal savings and loan associations is a lawful exercise of the power of Congress to levy taxes and spend the proceeds to promote the general welfare of the United States, and the power to spend funds for that purpose carries with it the power to organize appropriate corporate agencies to aid in its execution.

IV

Section 5 of the Home Owners' Loan Act of 1933 does not improperly delegate legislative power to the Federal Home Loan Bank Board merely because it does not prescribe a detailed plan of operation for Federal savings and loan associations. Congress may properly leave the details of the operation of Federal fiscal institutions to the discretion of an administrative board. *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. Because Section 5 restricts the field within which the Federal Home Loan Bank Board may act and sets up adequate standards to guide the

Board in acting within that field, it does not improperly delegate legislative power to the Federal Home Loan Bank Board.

V

The conversion of petitioners into Federal savings and loan associations does not violate the constitutional rights of the State of Wisconsin. No creditors or stockholders of petitioners are parties to these proceedings or object to the conversion of petitioners, and, the State of Wisconsin has no standing to enforce the rights of creditors and stockholders. The rights claimed by respondents for the State of Wisconsin are political and not proprietary in character. The Fifth Amendment, on which respondents apparently rely, does not protect purely political rights, nor will the Federal courts otherwise protect such rights, unless their invasion will destroy or impair a proprietary interest of the State. Finally, the political rights of the State of Wisconsin are not violated by the conversion of petitioners. The constitutional authority of Congress to create Federal savings and loan associations without the consent of the State of Wisconsin carries with it the power to convert a Wisconsin corporation into a Federal savings and loan association without the consent of the State, because the power to convert is co-extensive with the power to create. *Casey* v. *Galli*, 94 U. S. 673.

ARGUMENT

I

SECTION 5 (I) OF THE HOME OWNERS' LOAN ACT OF 1933 AUTHORIZES A MEMBER OF A FEDERAL HOME LOAN BANK TO CONVERT ITSELF INTO A FEDERAL SAVINGS AND LOAN ASSOCIATION WITHOUT THE CONSENT OF THE STATE UNDER WHOSE LAWS IT IS ORGANIZED

Section 5 (i) of the Home Owners' Loan Act of 1933 (48 Stat. 646; 12 U. S. C. A. 1464 (i)) provides:

> Any member of a Federal Home Loan Bank may convert itself into a Federal savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter.

There is no ambiguity in this language. It authorizes conversion on a vote of 51 per cent of the votes cast at a "legal meeting", subject to such rules and regulations as the Federal Home Loan Bank Board may prescribe. The requirement that the meeting be "legal" refers only to legality of

procedure under the applicable state law.[1] In no other respect does the section expressly or by implication require compliance with state law, or the consent of state authorities.

The obvious and literal construction of Section 5 (i) is supported by the history of the section. As first enacted (Act of Congress approved June 13, 1933, 48 Stat. 134), the section provided:

> Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act *upon a vote of its stockholders as provided by the law under which it operates;* but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act. (Italics supplied.)

By an Act of Congress approved April 27, 1934, (48 Stat. 646) the section was amended by striking out the words "by vote of its stockholders as pro-

[1] Respondents contend that a "legal" meeting to consider conversion cannot be held unless state law authorizes conversion. (Respondents' brief, p. 18.) This is not the ordinary and usual meaning of the word "legal" as applied to stockholders' meetings. Pressed to its logical conclusion, this contention means that a meeting, complying with all of the procedural requirements of state law, at which the stockholders voted against conversion, would be illegal *per se* merely because conversion was considered.

vided by the law under which it operates" and inserting the present provision, "upon a vote of 51 per centum or more of the votes cast at a legal meeting". Surely the purpose of this amendment was to permit conversion on a vote of 51 percent of the holders of the outstanding stock, even though the applicable state law required a larger vote. The low figure of 51 percent is quite inconsistent with an intent to set up a requirement supplementary to that of state law, and not exclusive.[2] If the section is intended to override state law with respect to the number of votes required, it is unreasonable to assume that it is intended to require compliance with other provisions of state law or the consent of state authorities.

Respondents contend that "an intention to override the law of the state by Congressional enactment should not be presumed without clear language expressing such intention". (Respondents' brief, p. 16.) But here no presumption is necessary. Congress has expressed that intent in clear language, as is shown by the fact that in similar statutes it has recognized that language like that of Section 5 (i) overrides state law unless a con-

[2] Respondents assert that Section 5 (i) as amended "establishes a minimum of 51 per centum required by the Federal Government" (Respondents' brief, p. 15). An intent to establish this minimum as supplementary to the requirements of state law could be based only on the assumption that in some States conversion was possible on a vote of less than 51 percent—an unreasonable assumption.

trary intent is plainly expressed. Thus, in the law with respect to the conversion of state banks into national banks, Congress provided as follows (R. S., Sec. 5154, as amended by 38 Stat. 258; 12 U. S. C. A. 35):

> Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than 51 per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency: *Provided, however, That said conversion shall not be in contravention of the State law.* (Italics supplied.)

In the case of the conversion of state corporations into national agricultural credit corporations, Congress provided (March 4, 1923, c. 252, Title II, § 213, 42 Stat. 1469; 12 U. S. C. A. 1281):

> Any agricultural or livestock financing corporation incorporated by special law of any State or organized under the general laws of any State and having an unimpaired capital sufficient to entitle it to become a National Agricultural Credit Corporation may, by the vote of the shareholders owning

> not less than 51 per centum of the capital stock of such corporation, with the approval of the Comptroller of the Currency, be converted into a National Agricultural Credit Corporation under this chapter, with any name approved by the Comptroller of the Currency: *Provided, That the said conversion shall not be in contravention of the State Law.* (Italics supplied.)

In these cases Congress used unequivocal language to accomplish its intent. Had it possessed the same intent when it enacted Section 5 (i), it would have used equally clear language.

If, despite the plain import of the language of Section 5 (i) and the obvious intent of Congress, doubt still remains as to the meaning of the section, the decision of this Court in *Casey* v. *Galli*, 94 U. S. 673, is conclusive. In that case the Comptroller of the Currency, as receiver of an insolvent national bank, sued a shareholder of the bank to enforce his statutory liability. The bank had been incorporated originally under the law of Louisiana. It had become a national bank pursuant to the provisions of Section 44 of the National Bank Act of 1864 (13 Stat. 112), which, at the time of the conversion, provided in part as follows:

> That any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national association under its provisions, by the name

> prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act.

The defendant filed a plea of *nul tiel corporation* based on the contention that the bank had no authority under its charter or otherwise from the State of Louisiana to become a national bank. The Court rejected that contention, saying (p. 678):

> No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat. 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally.

Section 5 (i), like the Section 44 of the National Bank Act involved in that case, "is silent as to any assent or permission by the State."

Respondents attempt to distinguish *Casey* v. *Galli*, 94 U. S. 673, on the ground that the language of Section 44 of the National Bank Act of 1864 is different from that of Section 5 (i). (Respondents' brief, pp. 16–18.) They point out that Section 44 provided that a state bank might *"by authority of this Act* become a national association *under its provisions"*; that Section 5 (i) provides that a member of a Federal Home Loan Bank may "convert itself into a Federal savings and loan association *under this Act"*, and they contend that because the words *"under this Act"* in Section 5 (i) modify the words "Federal savings and loan association" and not the word "convert", the section must be construed differently from Section 44. Both the premise of the argument and the conclusion which respondents draw therefrom are unsound. The words "under this Act", properly construed, modify "convert". To construe them as modifying "Federal savings and loan association" is to assume that Congress thought it necessary to distinguish the Federal savings and loan associations provided for by Section 5 from other similar associations provided for by other statutes. That assumption is unwarranted because there are no Federal savings and loan associations other than those existing under Section 5. But in any event, the question of what the words "under this Act" modify is immaterial. As the language of the

court plainly shows, the decision in *Casey* v. *Galli*, 94 U. S. 673, did not depend in the least on the words "by authority of this Act", or on the particular position they occupied in the sentence, but rather *on the silence of the section as to the necessity of assent or permission by the State.*

Respondents also set forth that portion of the opinion of the court below in which it is suggested that the decision in *Casey* v. *Galli*, 94 U. S. 673, is to be distinguished because the National Bank Act of 1864 "constituted an unmistakable investiture of corporate powers upon State banks." (Respondents' brief, p. 17.) There is no merit in this suggested distinction because the provisions of Section 5 invest Federal savings and loan associations with corporate powers to the same extent as did the National Bank Act of 1864.[8]

Respondents rely finally on the canon of construction that a statute should be construed so as

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[8] For example, sub-paragraph (a) of Section 5 authorizes the issuance of charters to Federal savings and loan associations. Sub-paragraph (b) provides for the manner in which they shall raise their capital. Sub-paragraph (c) authorizes loans and investments. Sub-paragraph (k) provides for the appointment of Federal savings and loan associations as fiscal agents of the United States.

This distinction of the court below appears to rest on the premise that conversion under the National Bank Act involved a change in the corporate identity. This is not the case, because this Court has held that conversion under that Act does not destroy the identity of the state bank or its corporate existence, but merely results in a continuation of the same body under a different jurisdiction. See *Metropoli-*

to avoid doubts of its constitutionality. (Respondents' brief, pp. 18–19). That canon should be used to throw light on the meaning of ambiguous language, not to distort and confuse the meaning of clear and unequivocal words. Even if the constitutional doubts were serious, they would afford no basis for giving to the unambiguous language of Section 5 (i) a meaning which Congress did not intend.

In this connection it should be pointed out that respondents contend that the construction of Section 5 (i) here asserted would impair the contractual rights of stockholders and creditors. (Respondents' brief, pp. 23–25.) Section 5 (i) properly construed, is not unconstitutional for that reason, (*infra*, pp. 56–61) and, if it were, the respondents, who are officials of the State of Wisconsin, would

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tan National Bank v. *Claggett*, 141 U. S. 520; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293.

Respondents appear to suggest that the decision in *Casey* v. *Galli* does not apply here because petitioners are not banks. Applied to the question of construction this argument leads to an absurd result. Section 5 (i) applies both to banks and to other kinds of corporations. (It authorizes conversion by any member of a Federal Home Loan Bank and a cooperative bank or a savings bank may be such a member. See Federal Home Loan Bank Act, 47 Stat. 726, 12 U. S. C. A. 1424.) If respondents' suggestion is sound, Section 5 (i) has one meaning if an institution is a bank and another quite different meaning if it is not. But the plain and literal meaning of Section 5 (i) obviously was intended to be constant and not to vary with the character of the institution attempting conversion.

have no standing to enforce the rights of the stockholders and creditors. A State does not stand in *parens patriae* to its citizens so that it can enforce their legal rights (*Massachusetts* v. *Mellon*, 262 U. S. 447). In not one of the instant cases is a stockholder in, or a creditor of, the petitioner corporation a party.[4] The issue in these cases is whether a state savings and loan association can convert into a Federal agency without the consent of the State. An affirmative answer to the question thus presented does not require a determination of the rights of stockholders and creditors. Any invasion of the constitutional rights of a stockholder or a creditor can be pleaded in a proceeding to which he is a party; but the mere assertion in this controversy of invasion of those rights lends no support to the construction of Section 5 (i) for which respondents contend.

The court below held merely that Section 5 (i) does not authorize conversion by a state savings and loan association without the consent of the State under whose laws it is organized and did not purport to decide the constitutional questions raised by respondents. In the event, however, that this Court should conclude to determine all of the

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[4] In each case conversion was authorized by the holders of more than two-thirds of the outstanding stock. The facts with respect to the action of the stockholders on the question of conversion are set forth on pages 56–57, *infra*.

questions raised by the respondents in the court below the following arguments in support of the constitutionality of Section 5 (i) are submitted:

II

SECTION 5 OF THE HOME OWNERS' LOAN ACT OF 1933 IS A LAWFUL EXERCISE OF THE FISCAL POWERS OF CONGRESS

Section 5 of the Home Owners' Loan Act of 1933, authorizing the creation of Federal savings and loan associations, is one of the latest of a series of enactments extending over more than a century by which the Federal Government has recognized and fulfilled its obligations to provide a national system of financial institution for handling the credit and exchange requirements of industry, commerce and agriculture, supplying a national currency and promoting the fiscal affairs of the Government. The courts have found authority for this activity in the aggregate of the powers granted to Congress by Art. I, Sec. 8 of the Constitution. In *Norman* v. *B. & O. R. R. Co.*, 294 U. S. 240, this Court said (at page 303):

> The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress. * * *

Early in the last century the Bank of the United States was established (Act of April 10, 1816, c. 44,

3 Stat. 266). The Act of February 25, 1863, c. 58, 12 Stat. 665, established National Banking Associations, with large powers over the currency. The Federal Reserve System was established by the Act of December 23, 1913, c. 6, 38 Stat. 251, to protect credit resources in time of stringency. The Banking Act of 1933 (c. 89, 48 Stat. 162) created the Federal Deposit Insurance Corporation and provided for the insurance of bank deposits. The Federal Farm Loan Act with provisions for the Federal Land Banks, Joint Stock Land Banks and National Farm Loan Associations was added July 17, 1916 (c. 245, 39 Stat. 360). By an amendment of March 4, 1923, c. 252, 42 Stat. 1454, the Federal Intermediate Credit Banks became a part of the system. The Agricultural Marketing Act of June 15, 1929, c. 24, 46 Stat. 11, provided credit for certain farmers' cooperative associations. To finance building, savings, and loan associations and other similar organizations the Federal Home Loan Bank Act of July 22, 1932, c. 522, 47 Stat. 725, was passed. The Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, as amended, provided credit facilities for banks, railroads and other classes of borrowers.

The authority to legislate in this manner for these broad purposes has been invariably upheld when tested. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *United States Bank,* 9 Wheat 738; *Farmers' etc. National Bank* v. *Dearing,* 91 U. S.

29; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Westfall* v. *United States*, 274 U. S. 256.

The Federal Home Loan Act and Section 5 of the Home Owners' Loan Act of 1933 were designed to supplement and strengthen the fiscal institutions and credit systems previously established by Congress, by strengthening and stabilizing home mortgage credit. The importance of home mortgage credit to the credit and currency system of the country and to the fiscal institutions created by Congress is too obvious to require emphasis. No exact statistics are available as to the amount of home mortgages outstanding, but an estimate of $20,000,000,000 is not unwarranted.[5] Such mort-

[5] When the Senate Committee on Banking and Currency was holding hearings on the National Housing Act, it was furnished an estimate by John H. Fahey, Chairman of the Home Owner's Loan Corporation, that the outstanding home mortgages in the United States in May, 1934, amounted to approximately $21,000,000,000 (Letter of Mr. Fahey dated May 11, 1934, addressed to Senator Duncan Fletcher, Chairman of the Committee, and introduced in evidence on May 16, 1934. See *Hearings before Committee on Banking and Currency, United States Senate*, 73rd Cong., 2nd Sess., S. 3603, pp. 20-21). This estimate was based in part on figures from *Internal Debts of the United States* by Evans Clark, a survey financed by the 20th Century Fund and published by the Macmillan Publishing Company. Mr. Clark estimated the outstanding urban mortgage and real estate indebtedness of the United States as of December 31, 1931, as approximately $35,000,000,000.

In *First Mortgages in Urban Real Estate Finance* by John H. Gray and George W. Terborgh, published May 1, 1929, by the Brookings Institution, it is estimated that, exclusive of mortgage holdings of mortgage companies, fire and casualty

gages constitute a substantial part of the assets of financial and fiduciary institutions such as savings banks, commercial banks, and insurance companies.[6] Stabilization of home mortgage credit has a direct bearing on the liquidity and solvency of these institutions and on the protection of the large amount of Federal funds which are deposited in some of them. In the light of these facts, it is apparent that violent inflation or deflation of home mortgage credit reacts directly and forcibly on the whole credit and monetary system of the nation and ultimately on the fiscal operations of the Federal Government. Between 1929 and 1930 home mortgage credit underwent a severe deflationary process. There was a great increase in the number of foreclosures.[7] The extent to which the sources

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insurance companies, educational foundations and similar institutions, the total urban mortgages outstanding amounted as of August 31, 1928, to $24,767,816,000. This figure, of course, includes mortgages which cannot properly be regarded as home mortgages, but it excludes the large holdings of the institutions referred to above.

[6] It has been estimated that member banks of the Federal Reserve System on December 30, 1933, held mortgages on residential properties amounting to approximately $800,000,000 (Member Bank Call Report No. 60, Federal Reserve Board, December 30, 1933, table, p. 3).

[7] Figures, based upon reports received monthly by the Division of Research and Statistics of the Federal Home Loan Bank Board, were presented to the Senate Committee on Banking and Currency when it was considering the National Housing Act and show that 78,356 mortgages on urban homes were foreclosed, in 1926 there were 273,384 fore-

of mortgage money were impaired is illustrated by the statistics with respect to new loans by two of the largest lending sources, life insurance companies and building and loan associations. Twenty-five leading life insurance companies which had invested $840,000,000 on mortgages in city properties in 1929 invested only $30,000,000 in such mortgages in 1933 and only $15,000,000 in the first part of 1934.[8] New loans made by building and loan associations decreased from $1,900,000,000 in 1928 to $394,000,000 in 1933 and $277,000,000 in 1934.[9] The guaranteeing of mortgages, which was an important part of the distribution of real estate securities had practically ceased.[10] Congress was aware of these facts and the Federal Home Loan

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closures on such homes in 1932 and 271,996 in 1933. (See *Hearings before Committee on Banking and Currency*, United States Senate, 73rd Cong., 2nd Sess., S. 3603, p. 217).

[8] These figures are taken from a compilation made in August 1935 by the Bureau of Agricultural Economics, Department of Agriculture, based upon weekly figures from reports of life insurance companies appearing periodically in Wall Street Journal and New York Evening Post.

[9] Press release, Federal Home Loan Bank Board, March 20, 1935, "Lending Capacity of the Building and Loan Association".

[10] Statistics on a national scale are not available but fifty New York companies with total outstanding guaranties of $2,867,000,000 in 1930 had suspended payments in 1933 (Report of October 5, 1934, to the Governor of New York by George W. Alger, Commissioner under the Moreland Act, concerning the affairs of title and mortgage guaranty corporations, pp. 9, 62, 63, 65).

Bank Act and Section 5 of the Home Owners' Loan Act of 1933 were enacted to strengthen the entire national credit and currency system and the fiscal institutions theretofore set up by Congress by stabilizing and reviving home mortgage credit."

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[11] The Report of the House Committee on Banking and Currency recommending the passage of the Federal Home Loan Act (H. R. 12280) contains the following statements under the heading "Reasons for a Home Loan Bank System" (72d Cong. 1st Sess. House Report #1418, pp. 9–10):

"The investment in the homes of the country is a significant and imposing portion of our national wealth. Much of the decline in the values of residential real estate has been due to the lack of credit during the last two years. Foreclosures and inability to borrow on homes create distress conditions and low prices in homes, which are supposed to be the most stable of property and investments. Home owners must have funds before business can recover. The existence of a home loan bank system will in the future prevent the recurrence of present conditions. If deflation in the value of homes continues through lack of credit, the life savings of millions of ordinary people who have bought homes will be lost.

"Hundreds of small banks which have closed could have carried on if they had had a way of raising money on their good mortgages. Building and loan associations have disappointed thousands of their investors in that they have been unable to return their savings within reasonable notice. The home loan bank system will develop funds which would reach the small investors in these thrift and home financing institutions. It will be needed to counteract any drift of money away from the home financing activities that specialists in this field believe may come as the result of the depression.

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"Unless there be a restoration of confidence in realty values, hundreds of towns and cities having heavy bonded

It is not necessary, however, to rely solely on the relation between Federal savings and loan associations and the national credit and currency system to bring those institutions within the creative powers of Congress. It is well settled by decisions of this Court that Congress may create appropriate corporate agencies to aid in the execution of its fiscal powers. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *The Bank,* 9 Wheat. 738; *Farmers' & Mechanics' National Bank* v. *Dearing,* 91 U. S. 29; *Smith* v. *Kansas City Title & Trust Company,* 255 U. S. 180. The Federal savings and loan associations, which are created by Section 5 of the Home Owners' Loan Act of

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indebtedness and depending upon the collection of ad valorem taxes upon real estate, principally homes, for the repayment of their debts and interest, will have their credit permanently destroyed. Property owners are failing and refusing to pay taxes under the present demoralized conditions of realty values and the home-financing institutions are unable to advance the money for them because they do not have the surplus funds with which to make any loans, however necessitous they may be.

"The years 1920–1921 and 1929–1932 demonstrated a permanent need for a reserve system for the home-financing institutions, just as commerce and industry has the Federal reserve system and agriculture has the Federal farm loan system. It will stabilize these thrift and home-financing institutions; will improve and standardize mortgage practices; will decrease costs of mortgage money, and will regulate the supply of mortgage credit in a way that will discourage building booms and support normal construction year in and year out." (p. 10)

1933, are such agencies. Subparagraph (k) of that section provides (c. 168, 48 Stat. 646):

> When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

As fiscal agents these associations must perform such duties in connection with the receipt, disbursement, and transmission of public money, and with the other fiscal operations of the Government, as may be required of them. Furthermore, Federal savings and loan associations are directly and closely related to Federal Home Loan Banks, which are likewise fiscal agents of the Federal Government.[12] Section 14 of the Federal Home Loan Bank Act provides (47 Stat. 736):

> When designated for that purpose by the Secretary of the Treasury, each Federal

[12] Each Federal savings and loan association must be a member of a Federal Home Loan Bank (Home Owners' Loan Act of 1933, Section 5, sub-paragraphs (f) and (i)).

> Home Loan Bank shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it.

The functions of Federal savings and loan associations and Home Loan Banks as fiscal agents are similar to those of the Federal Land Banks, whose constitutionality was sustained by this Court in *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180, on the ground that they were appropriate agencies to aid in the execution of the fiscal powers of the Federal Government. Section 6 of the Federal Farm Loan Act (39 Stat. 365; 12 U. S. C. 701) provided, in part as follows:

> That all Federal Land banks and joint stock land banks organized under this Act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. • • •

The similarity of the statutes is obvious and striking. Accordingly to the decision in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, in the absence of any valid ground of distinction, establishes the authority of the United States to create Federal savings and loan associations. It is true that Federal savings and loan associations are not expressly authorized to act as depositaries of public money, but they are empowered to act as fiscal agents and are directly related to the Federal Home Loan Banks which are authorized to act as depositaries of public money. There is no suggestion in the opinion in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, that express authorization to act as depositary is decisive of the question of whether a corporation is an appropriate agent to aid the United States in the execution of its fiscal powers. The custody of public money is one duty which a fiscal agent may perform, but there are other duties, equally important, which it may perform; and it seems obvious that in creating a particular fiscal agent the United States is not required to endow it with authority to perform all fiscal functions for which it might be used.

It is also clear that the Federal savings and loan associations and the Federal Home Loan Banks will aid Congress in the execution of its power to borrow money on the credit of the United States. As fiscal agents these corporations can serve as agencies for the sale of Government bonds. Fur-

thermore, both the Home Loan Banks and the Federal savings and loan associations are authorized to invest in Government securities.[13] Section 5 (c) of the Home Owners' Loan Act of 1933 provides that any portion of the assets of a Federal savings and loan association may be invested in obligations of the United States. Section 11, subparagraph (g) of the Federal Home Loan Bank Act requires each Federal Home Loan Bank to invest its reserves in certain designated securities, which include obligations of the United States.[14] Section

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[13] There is no significance in respondents' point that Federal savings and loan associations are not authorized "to deal" in government securities (Respondents' brief, p. 45). They are clearly authorized to buy them, and, having bought them, presumably they may sell. Moreover, as fiscal agencies they could be used as media for the sale of such securities to the public.

[14] Section 11, subparagraph (g) of the Federal Home Loan Bank Act provides as follows (c. 847, 48 Stat. 1262): "Each Federal Home Loan Bank shall at all times have an amount equal to the sums paid in on outstanding capital subscriptions of its members, plus an amount equal to the current deposits received from its members, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or non-member borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or non-member borrowers whose creditor liabilities (not including advances from the Federal Home Loan Bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe."

11, subparagraph (h) of the Federal Home Loan Bank Act provides that such part of the assets of each Federal Home Loan Bank (except reserves) as are not required for advances to members or non-member borrowers may be invested to such extent as the bank may deem desirable and subject to regulations prescribed by the Federal Home Loan Bank Board, in, among other things, obligations of the United States."[11] It is reported by the Federal Home Loan Bank Board that the twelve Federal Home Loan Banks as of October 4, 1935, held $5,069,575 face amount of United States bonds and $12,347,223 face amount of bonds of Home Owners' Loan Corporation which are guaranteed as to principal and interest by the United States. The fact that the government is to invest in the shares of Federal savings and loan associations is not inconsistent with their assisting the borrowing power as respondents suggest (Respondents' brief, page 35). All of the capital is not to be provided by the Government (the aggregate amount of shares in a savings and loan association held by the Secretary of

[11] Section 11, subparagraph (h) provides as follows (c. 847, 48 Stat. 1263): "Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in sub-section (g)) as are not required for advances to members or non-member borrowers, may be invested, to such extent as the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located."

the Treasury is not to exceed the aggregate amount of those held by all other shareholders, Section 5 (g)). Furthermore, as respondents themselves point out elsewhere in their brief, Section 5 contemplates that in time the investment of the government shall be repaid. Respondents further assert that the power to invest in Government securities was given "to aid the association in carrying on its business" (Respondents' brief, page 36). The fact that the benefits of investment may be mutual does not detract from the fact that these institutions can be of real service to the borrowing power.

Respondents contend that savings and loan associations are not banks, and that the power of the Federal Government to create fiscal agents extends only to banks and not to other kinds of corporations. (Respondents' brief, p. 39.)[16] There is

[16] Respondents assert that a building and loan association "should not even be classified as a 'moneyed corporation'" (Respondents' brief, p. 39). Whether such an institution should be called a moneyed corporation is immaterial. In any event, respondents' assertion seems unsound. The statutes of the State of Wisconsin contain no definition of moneyed corporations. It is significant, however, that in New York building and loan associations are classified as moneyed corporations. See General Corporation Law, Section 3, and Banking Law, Sections 375–438 (*McKinney's Consolidated Laws of New York*).

Respondents' discussion of the characteristics of a building and loan association (Respondents' brief, pp. 39–42) is irrelevant. It may be conceded that such an association is not exactly like a bank in every respect without impairing in

little substance in the asserted difference on which this distinction rests. A savings and loan association performs one highly important banking function—it extends credit on the security of real estate. The similarity between a bank and the savings and loan association is shown by the fact that in the State of Wisconsin (as in many States) savings and loan associations are under the jurisdiction of the state banking commission, whose members are the respondents in these cases. In any event the power of Congress to create fiscal agencies is not confined to the creation of a particular kind of corporation. It is a power to create any kind of agency which is appropriate to assist in the execution of the fiscal powers. In *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180, the Court said (pp. 210–211):

> But whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation.

In this connection it is significant that the Federal Farm Loan Act provided for the organization of national farm loan associations (Federal

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any way the contention that such institutions are appropriate agencies to aid the Government in its fiscal operations and that their creation is authorized by the decision in *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180. Not one of the characteristics attributed by respondents to a building and loan association is inconsistent with its acting as a fiscal agent of the government.

Farm Loan Act, c. 245, Section 7, 39 Stat. 365–367; 12 U. S. C. A. 711), to be composed of persons desiring to borrow money under the terms of that Act. It may be doubted whether these associations were technically banks yet it seems clear that their creation was within the power of Congress. Their validity was not directly involved in *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180; but there is no suggestion in the opinion that their creation was outside the powers of Congress. If there were doubt on this point it would seem to be removed by the remarks of this court in the later case of *Federal Land Bank* v. *Gaines*, 290 U. S. 247. There, the Court described a Federal Land Bank and a *national farm loan association* as (p. 254)—

> * * * in a broad and general sensed, public agencies or instrumentalities to carry out a policy of the government—the extension of credit to those engaged in agriculture to be availed of in the furtherance of agricultural undertakings * * *.[17]

Respondents contend that it is apparent "from the face of the Act" that the purpose of Congress in enacting Section 5 was not to create fiscal

[17] It should be noted that national farm loan associations were not authorized either to act as fiscal agents or to invest in Government obligations. They therefore were not so intimately and directly related to the fiscal operations of the Government as are the Federal savings and loan associations provided for by Section 5 of the Home Owners' Loan Act.

agencies. (Respondents' brief, p. 44.) Despite respondents' disclaimer, this is in effect an attack on the motive of Congress. A similar argument was made and decisively rejected by this court in *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180. The court said (pp. 210, 211):

> But, it is urged, the attempt to create these Federal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. *Véazie Bank* v. *Fenno*, 8 Wall. 533, 541; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.
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> We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United

States bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions.

There is no foundation in the record for respondents' suggestion that when Congress authorized Federal savings and loan associations to act as fiscal agencies it "had no specific governmental duties in mind which these associations could perform" (Respondents' brief, p. 45). But if true it would be immaterial. The same argument could have been made with equal force with respect to the Federal Farm Loan Act sustained in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180. When Congress creates a fiscal agency it is not required to specify in exact detail the duties which it wishes to have it perform.

The fundamental defect in respondents' argument that Federal savings and loan associations are not fiscal agencies of the United States is that it separates *one* function of Federal savings and loan associations—the provision of home mortgage credit, and treats it as if it were the sole reason for their creation.[18] An attack on the validity of a

[18] If it is true that the federal government has no power to organize savings and loan associations because they are intended to provide home mortgage credit, it would seem equally true that the federal government has no power to organize the Federal Home Loan Banks because they are intended to provide credit for building, savings and loan associations and similar organizations. Yet the State of Wisconsin by authorizing Wisconsin corporations to become members of a

federal fiscal institution cannot be based on any such dissection of its functions. In *First National Bank* v. *Union Trust Company*, 244 U. S. 416, this Court reversed a decision of the Supreme Court of Michigan, holding that Congress had no power to authorize a national bank to act as a trustee or executor. The Court stated one of the reasons for the reversal as follows (pp. 423–424):

> But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, but on the contrary directly conflicted with what was decided in those cases, that is to say, disregarded their authority so as to cause it to be our duty to reverse for the following reasons:
>
> * * * Because the opinion of the court instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by

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Federal Home Loan Bank (See Section 215.07 (8) Wisconsin Statutes, enacted by the Wisconsin Legislature on July 10, 1933) appears to have recognized, at least by implication, the validity of the creation of those banks.

> considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations, a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases."

Respondents finally appear to suggest that there is no necessity for the creation of additional fiscal agencies. (Respondents' brief, p. 46) in *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, this Court, speaking of the national banks created by the National Bank Act of 1864, said (at p. 33):

> * * * The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge."[19]

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[19] See also *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, where the court said Federal Land Banks were "within the creative powers of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions" (p. 211).

[20] See also *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, where the Court said, after discussing the decisions

III

THE CREATION OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS IS A LAWFUL EXERCISE OF THE POWER OF CONGRESS TO LEVY TAXES AND SPEND THE PROCEEDS TO PROMOTE THE GENERAL WELFARE OF THE UNITED STATES.

1. CONGRESS HAS THE POWER TO LEVY TAXES AND SPEND THE PROCEEDS TO PROMOTE THE GENERAL WELFARE OF THE UNITED STATES.

Clause 1, Section 8, Article I of the Constitution provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the debts and provide for the common Defence and general Welfare of the United States.

This clause does not expressly provide that Congress may appropriate and spend the funds raised by taxation, but it is obvious that the power is granted. The framers of the Constitution could hardly have intended to confer a power to tax and

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of Chief Justice Marshall sustaining the right to organize a national bank (p. 209):

> "That the formation of the bank was required in the judgment of the Congress for the fiscal operations of the Government, was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose being an appropriate measure in the judgment of Congress, it was held not to be within the authority of the court to question the conclusion reached by the legislative branch of the government."

at the same time to withhold the power to spend the funds raised by taxation.[21]

It has been generally assumed that the words "and provide for the * * * general welfare of the United States" do not confer an independent power to legislate for the general welfare but are a limitation on the taxing power. There are two views of the nature of the limitation they impose. One view is that the taxing and spending power is limited to the accomplishment of objects germane to the other specified powers of Congress.[22] The other view is that the taxing and spending power may be used for the accomplishment of any object which promotes the national as distinguished from state or local, welfare. This Court has never expressly decided the precise question raised by these conflicting views.[23]

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[21] See *United States* v. *Realty Co.*, 163 U. S. 427, where the Court said (p. 440): "Under the provisions of the Constitution, (*Article I, section 8*) Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has the power, when the money is raised, to appropriate it to the same object." See also *Story on the Constitution*, 5th Edition, Section 923.

[22] The classic statement of this view is found in Mr. Madison's letter of November 27, 1830, to Mr. Stevenson. See 9 *Writings of James Madison*, Hunt, Ed. 411 et seq.

[23] Mr. Justice Story regarded a statement made by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, at p. 199, as indicating that he accepted the view that the taxing and spending power was not limited by the other specified powers of Congress but could be used to promote the general welfare

It is submitted that the sounder view is that the taxing and spending power of Congress is not limited or restricted by its other specified powers. This construction is supported by three considerations of decisive weight. In the first place, this is the plain and literal import of the language of the Constitution and the only construction which gives meaning to the words "and general Welfare of the United States." If the spending power were restricted to objects within the other specified powers, those words would be useless because the power conferred on Congress to make all laws "which shall be necessary and proper for carrying into execution" the specified powers clearly carries with it the power to tax and spend in the execution of those powers. It is one of the elementary canons of constitutional construction that words shall not be con-

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of the United States (Story, Constitution of the United States, 5th Edition, Sec. 927). See also *United States* v. *Gettysburg Electric Railway Co.*, 160 U. S. 668, where this Court said, p. 681: "It [Congress] has the great power of taxation to be exercised for the common defence and general welfare."

This view of the welfare clause has also been taken by two Circuit Courts of Appeals. See *Kansas Gas & Electric Co.* v. *City of Independence, Kansas* (C. C. A. 10th) decided August 20, 1935, not reported; and *Langer* v. *United States* (C. C. A. 8th) 76 Fed. (2d) 817. The United States District Court for the Western District of Missouri has taken the view that the correctness of this construction is the logical inference to be drawn from the decision of this Court in *United States* v. *Realty Co.*, 163 U. S. 427. See *Missouri Utilities Co.* v. *City of California*, 8 Fed. Supp. 454.

strued as meaningless if it is possible to give them meaning.

In the second place, this construction is given weighty support by those who assisted in the framing and adoption of the Constitution, and their contemporaries. Thus, this construction was apparently adopted by Washington when he recommended, in his 8th annual address to Congress on December 7th, 1796, appropriations to encourage agriculture and to establish a national university—appropriations permissible only under a literal reading of the welfare clause. (Richardson, Messages and Papers of the Presidents, Vol. I, p. 202.) This view was advocated by Hamilton. (*Report on Manufactures,* Works, Hamilton Edition, Vol. 3, pp. 249–251.) It was also the view of Monroe (*View of the President of the United States on the Subject of Internal Improvements,* Richardson, Messages and Papers of the Presidents, Vol. II, pp. 162–167).[24] Later this con-

[24] Monroe caused a copy of this message to be sent to each of the justices of the Supreme Court. In acknowledging its receipt, Chief Justice Marshall wrote to him that he found the views expressed therein "profound" and "most generally just". It appears that Mr. Justice Johnson obtained the views of his associates on the bench with respect to the questions discussed by Monroe and communicated them to him in a letter in which he stated: ". . . it is impossible to resist the lucid and conclusive reasoning contained in the argument." For an account of this episode see *The Supreme Court in United States History*, by Charles Warren, 2, pp. 55–57.

struction was adopted by Mr. Justice Story in his *Commentaries on the Constitution of the United States,* 5th Edition, Sections 922-924.[25]

Finally, this construction is supported by uniform and long continued legislative practice. From the very beginning of the federal government the annual appropriations of Congress show an assertion of authority to appropriate money for objects outside the scope of the other specified powers. It has granted money and property for the relief of distress caused by catastrophes.[26] It has made ex-

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[25] This construction was also adopted in 1817 by a special committee of the House of Representatives which considered the question in connection with a report on Mr. Monroe's First Annual Message to Congress. The Committee's report was written by Henry St. George Tucker of Virginia, (2 American State Papers, miscellaneous, 443). See also John C. Calhoun (5 Benton, abridgment, 706–707). It also has the support of later writers on the Constitution (see Hare, *American Constitutional Law*, 1, 241; Pomeroy, *Constitutional Law*, 10th Ed., 228–229; *Burdick on the Constitution*, Section 77; and Willoughby, *The Constitution of the United States*, 2d Ed. 1, Sec. 62).

[26] *Earthquakes.* Venezuela, 1812 (2 Stat. 730); New Madrid, Missouri, 1815 (3 Stat. 211); and Japan, 1925 (43 Stat. 963).

Indian Depredations. Florida, 1836 (5 Stat. 131); and Minnesota, 1863 (12 Stat. 652).

Fires. Alexandria, Virginia, 1827 (6 Stat. 356); Portland, Maine, 1866 (14 Stat. 364); Chicago, 1872 (17 Stat. 51, 646); San Francisco, 1906 (34 Stat. 827, 828); and Salem, Massachusetts, 1914 (38 Stat. 681).

War or Famine. The Southern States in 1867 (15 Stat. 28, 246); American citizens in Cuba in 1897 (30 Stat. 220); Alaskan natives of the St. Paul and St. George Islands in

penditures to promote the public health.[27] It has made appropriations to aid education and science,[28]

1897 and 1898 (30 Stat. 29, 226, 616); Europe in 1919 (40 Stat. 1161); and Russia in 1921 (42 Stat. 351).

Tornadoes or Cyclones. Mississippi, 1880 and 1913 (21 Stat. 306, 38 Stat. 211, 215, 216), and certain Southern States in 1908 (35 Stat. 572).

Yellow Fever. 1879 (21 Stat. 1); 1888 (25 Stat. 630, 631).

Grasshopper Scourges. 1875 (18 Stat. 303, 314); 1877 (19 Stat. 374), and 1878 (20 Stat. 127).

Floods. Mississippi River, 1874 (18 Stat. 34, 45); 1882 (22 Stat. 44, 378, 379); 1884 (23 Stat. 269, 273); 1890 (26 Stat. 33, 671); 1897 (30 Stat. 216, 219); 1912 (37 Stat. 634); and 1913 (38 Stat. 211, 215, 216). The Southern States generally in 1916 (39 Stat. 434) and in 1928 (45 Stat. 53, 543). The Ohio River in 1884 (23 Stat. 267, 268). The Rio Grande River in 1897 (30 Stat. 221).

[27] The Public Health Service cooperates with state and local health authorities, conducts studies in sanitary engineering and rural sanitation, disseminates health information and carries on research into the nature of and cure for disease. (*The Work of the United States Public Health Service*, Reprint No. 1447 from the Public Health Reports, Vol. 46, No. 6, Feb. 6, 1931, pp. 267–299, 1934, pp. 3, 14, 15, 16, 17.) It developed from the United States Marine Hospital Service. See 32 Stat. 712 and 37 Stat. 309.

See also the Act of March 3, 1879, which established the National Board of Health (20 Stat. 484); the appropriations made in 1888 to aid the sufferers from Yellow Fever (25 Stat. 630, 631); the Act of March 2, 1895, providing for a study of nutrition (28 Stat. 735); the appropriation of $1,000,000 to suppress the influenza epidemic in 1918 (40 Stat. 1008); and the Sheppard-Towner Maternity Health Act of 1931 (42 Stat. 224). The activities of the Bureau of Mines, for which more than $1,000,000 was appropriated in 1934, (48 Stat. 565) include the making of studies designed to promote the safety and health of miners.

[28] The Bureau of Education was established by the Act of March 2, 1867 (14 Stat. 434). See also the Act of February

and to promote the general social welfare of the country.[29] It has provided for the expenditure of money to aid agriculture.[30]

23, 1917 (39 Stat. 929), which provided for the distribution of money among the states to pay salaries of teachers, supervisors or directors of agricultural subjects, trade, Home Economics, and industrial subjects, and to prepare applicants for such positions. Between 1926 and 1933 the annual appropriations for these purposes amounted to $7,000,000. In 1914 the land grant colleges were authorized to give instruction in agriculture and home economics by publications, demonstrations and the like, to those who did not actually attend the colleges, and annual appropriations reaching $4,580,000 by 1923 were provided for that purpose (38 Stat. 372). In 1879 an act set apart $250,000 as a trust fund for aiding the education of the blind (20 Stat. 468).

Annual appropriations have been made for the support of the Smithsonian Institution. In 1934 the appropriation for the Smithsonian and its allied agencies was $874,024 (48 Stat. 516, 517). In 1879 Congress empowered the Geological Survey to examine the geological structure, mineral resources and products of the national domain (20 Stat. 394), and in 1925 authorized the President to complete a general topographical survey of the territory of the United States (43 Stat. 1011).

[29] Many of the activities of the Department of Labor are directed to this end. See 25 Stat. 182, establishing a Bureau of Labor Statistics; 41 Stat. 987, establishing the Women's Bureau, and 37 Stat. 79, establishing the Children's Bureau.

Appropriations of $1,000,000 a year for each of the years from 1926 to 1931 and from 1934 to date have been made to be allotted to the states for the promotion of vocational rehabilitation of persons disabled in industry or in any other legitimate occupation on the condition that the states expend at least equal sums and meet certain Federal requirements (41 Stat. 735, 736, as amended by 43 Stat. 430; 47 Stat. 448, 449).

[30] As early as 1839 an appropriation was made from the Patent Fund to be expended in the collection of agricultural

It is not contended that this legislative practice can confer power not otherwise possessed by Congress but if there is doubt as to the meaning of the welfare clause it should be construed in the light of this practical construction consistently followed by Congress. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 401; *McPherson* v. *Blacker,* 146 U. S. 1, 36; *McGrain* v. *Dougherty,* 273 U. S. 135, 174; *Martin* v. *Hunter's Lessees,* 1 Wheat. 304, 351–352; *Cohens* v. *Virginia,* 6 Wheat. 264, 418–421; *Ogden* v. *Saunders,* 12 Wheat. 212, 290; *Smiley* v. *Holm,* 285 U. S. 355, 369.

2. THE ORGANIZATION OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS WILL PROMOTE THE GENERAL WELFARE OF THE UNITED STATES

By the provisions of Sections 5 and 6 of the Home Owners' Loan Act of 1933, Congress has

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statistics and for other agricultural purposes (5 Stat. 353, 354). From that time until the creation of the Department of Agriculture in 1862, the collection of statistics and the distribution of seeds were regular functions of the Patent Office. For examples of appropriations for these purposes see 5 Stat. 523, 533; 5 Stat. 630, 642; 5 Stat. 681, 687; 5 Stat. 752, 757; 9 Stat. 155, 160; 9 Stat. 284, 285; 9 Stat. 354, 364; and 9 Stat. 523, 541. The Department of Agriculture was created in 1862, 12 Stat. 387. Its activities include the Weather Bureau, the Bureau of Animal Industry, the Bureau of Plant Industry, the Bureau of Dairy Industry, the Forest Service, the Bureau of Chemistry and Soils, the Bureau of Entomology and Plant Quarantine, the Bureau of Biological Survey, the Bureau of Public Roads, the Bureau of Agricultural Engineering, the Bureau of Agricultural Economics, and the Bureau of Home Economics.

provided for the expenditure of public moneys to assist in the organization of Federal savings and loan associations.[31] It has thus determined that such an expenditure will promote the general welfare of the United States. It is manifest that if Congress is entitled to apply the public money for the general welfare of the United States, it necessarily has a wide range of discretion with respect to the objects to be selected; and the determina-

[31] Sub-paragraph (g) of Section 5 authorizes the Secretary of the Treasury on behalf of the United States to subscribe for preferred shares in such associations, and authorizes the appropriation of $100,000,000 to pay for such subscriptions. The Fourth Deficiency Act of 1933, (48 Stat. 279), appropriated $50,000,000 to make payments for such subscriptions. Sub-paragraph (j) of Section 5 authorizes the Secretary of the Treasury to subscribe for income shares in Federal savings and loan associations, payment to be made from funds appropriated pursuant to sub-paragraph (g). As of September 30, 1935, the Secretary of the Treasury had invested, on behalf of the United States, approximately $49,000,000 in shares of Federal savings and loan associations. He has invested $50,000 in shares of Hopkins Federal Savings and Loan Association, the petitioner in cause No. 55.

In addition to these appropriations, Section 6 of the Home Owners' Loan Act of 1933 authorizes an appropriation of $150,000 out of any money in the Treasury not otherwise appropriated to be used in the discretion of the Home Loan Bank Board to encourage local thrift and local home financing, and to promote, organize and develop Federal savings and loan associations or similar associations organized under local laws.

The United States has invested more than $80,000,000 in the stock of the twelve Federal home loan banks (Daily Statement of the United States Treasury, July 31, 1935).

tion of Congress that the application of money to the organization of savings and loan associations will promote the general welfare is entitled to great weight. In *United States* v. *Realty Company*, 163 U. S. 427, this Court said, with respect to a determination by Congress as to the nature of a debt which could be paid under the power conferred by Clause I of Article 8, (p. 444):

> In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government.

If this be true of a determination by Congress that a claim is a *debt* within the meaning of the Constitution, *a fortiori* it must be true of a determination that a certain expenditure of funds will promote the general welfare, because the word "debt" has a much more definite legal content than have the words "general welfare".

In the instant cases the determination of Congress is not so arbitrary or unreasonable that it should be ignored or rejected. It should be noted

that subparagraph (a) of Section 5 begins: "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized * * * to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal savings and loan associations * * *." It is clear that in enacting Section 5, Congress was moved by the importance of the home to the well being of the citizen and the welfare of the nation."[22]

[22] This is clearly indicated by the Report of the House Committee on Banking and Currency, recommending the passage of the Federal Home Loan Bank Act (H. R. 12280; 72d Cong., 1st Sess., Report #1418). This report related to the Home Loan Bank Act, but it is obvious that its contents apply with equal force to the Home Owners' Loan Act of 1933 and particularly Section 5 thereof, which provides for the creation of Federal savings and loan associations as an integral part of the Home Loan Bank System. The report said, under the heading "Reasons for a Home Loan Bank System":

> "Figures show that home ownership in the United States is declining and that we are drifting into a nation of tenants. The principal reason is an insufficient amount of low-cost, long-term, installment mortgage money. The home loan bank bill is designed to place long-term funds in the hands of local institutions. Thus a debt-free home ownership can be created as borrowers reduce their debt from month to month. Our national credit structure needs, in addition to the Federal reserve system and the Federal farm loan system, these home loan banking units to serve the small saver and the home buyer in the cities and small towns. (p. 8).
>
> "The establishment of this system will enable thousands of deserving citizens who have been induced to undertake home ownership in the wrong way,

Although it is universally agreed that it is desirable for citizens to own their own homes, it is a matter of common knowledge that many now do not own their homes, or are living in homes which are unsanitary and otherwise inadequate. The depressed economic conditions of the last five years and the consequent stringency of credit have prevented the acquisition of homes by many citizens. The same conditions caused a tremendous increase in the number of foreclosures, with the result that many citizens who had invested in homes lost their investment.[33] Many citizens who have bought or constructed their own homes on the basis of mortgage credit are now faced with the necessity of refinancing their mortgages. It is estimated that the construction of houses has not kept pace with the growth of population.[34]

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namely, by a short-term mortgage which is now coming due, to save their equities by finding credit upon a proper basis through amortized long-term loans.

"Home ownership, as a national objective, will be permanently injured by the thousands of foreclosures that are now being made on homes, unless through the establishment of a credit system designed to prevent the recurrence, the public may know that such conditions can not again prevail. The millions of people who have placed their all in the purchase of a home must once again feel secure in their investment and have the courage to continue toward the full accomplishment of home ownership." (p. 10).

[33] See footnote No. 7, on p. 20, *supra*.

[34] The Bureau of the Census estimates that between April 1, 1930, and July 1, 1934, the population of the continental United States increased from 122,775,046 to 126,425,000 (*Statistical Abstract of United States, 1934*, published by the Department of Commerce, Bureau of Foreign and Domestic

It is significant that in enacting Section 5 Congress did not attempt to supply houses for the citizens of the country in competition with private enterprise or to give direct grants or subsidies to those desiring homes. The section contemplates the encouragement of home owning by means of savings and thrift—a program which is completely consistent with the American tradition of economic independence and self-reliance.

The program contemplated by Section 5 is national in scope and not concerned merely with state or local benefits. It can hardly be denied that the ownership of homes by citizens with its consequent beneficent results on their health and morale is a matter of vital concern to the national government as well as to state and local governments. The program contemplated by the National Home Loan

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Commerce, p. 10). A bulletin prepared by the Division of Construction and Public Employment of the Bureau of Labor Statistics of the United States Department of Labor, entitled "*Building Construction, February, 1935*", contains estimated figures for residential construction in 257 cities of the United States in 1934. These figures show that in the 257 cities, $76,370,924 was expended to provide houses for about 22,000 families. The 257 cities contained a population of approximately 47,000,000 (p. 57, Table No. 20). If these cities are regarded as representative of the nation as a whole, it would appear that throughout the nation in 1934 houses were erected for only 55,000 families. On the basis of the population figures given above, it may be estimated that in 1934 the population of the United States increased by 1,000,000 persons. If a family is regarded as consisting of four persons, this meant an increase of approximately 250,000 families in the year.

System deals with the problem of home mortgage credit on a national scale. By Section 3 of the Federal Home Loan Bank Act the Federal Home Loan Bank Board is directed to divide the continental United States, Puerto Rico, the Philippine Islands, and the territories of Alaska and Hawaii into not less than eight nor more than twelve districts, and as soon as practicable to establish a Federal Home Loan Bank in each district. Section 5 of the Home Owners' Loan Act of 1933 clearly contemplates that savings and loan associations shall be chartered in each of these districts provided, in each case, of course, that the standards set up by the section are met. It may be true that the expenditure of public money for shares in a Federal savings and loan association in its immediate aspect is a local application of money, but that is true of any exercise of the spending power. A fort must be constructed in a particular locality, but who will contend that for that reason the money spent for its construction is not spent to provide for the common defense. The test of whether an application of money is for a national as opposed to a local purpose is to be found in the problem to which it is directed and the benefits which it is hoped to achieve. By this test the Federal Home Loan System, and the savings and loan associations incorporated therein, are national and not local in character.

The power to spend public money to encourage thrift and to provide for home financing carries

with it the power to organize appropriate corporate agencies to aid in that activity. In the exercise of its spending power, Congress is not limited to the absolute disposition of money.[35] If it has the power to apply money directly to encourage thrift and provide for home financing, it clearly has the power to achieve the same result by organizing corporations and investing public funds in their shares. In this respect the spending power stands on the same footing as the other fiscal powers of Congress; and the power to establish appropriate corporate agencies in connection with the execution of those powers is well established by the decisions in *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *The Bank,* 9 Wheat. 738; *Smith* v. *Kansas City Title & Trust Company,* 255 U. S. 180.

IV

SECTION 5 OF THE HOME OWNERS' LOAN ACT OF 1933 DOES NOT IMPROPERLY DELEGATE LEGISLATIVE POWER TO THE FEDERAL HOME LOAN BANK BOARD

It should be noted that the provisions of Section 5 do not relate to a wide field of possible administrative action. On the contrary, they deal with a

[35] Respondents assert that the spending power is not involved because "in substance the Federal Government makes a loan to the local association to permit it to start business" (Respondents' brief, page 34). Viewed strictly, the acquisition of shares is not a loan but an investment, but whether it be a loan or investment it is clearly an exercise of the spending power.

limited subject matter—the organization of Federal savings and loan associations. Within that limited field certain powers are conferred on the Federal Home Loan Bank Board, and the conditions under which they are to be exercised and the matters to which their exercise is to be addressed are carefully defined.

Respondents' argument that Section 5 improperly delegates legislative power to the Board rests, in the last analysis, on the contention that the section is defective because it does not set forth a detailed plan of operation for Federal savings and loan associations.[36] But this is precisely the kind of administrative function which properly may be delegated. When Congress establishes federal fiscal institutions it may properly give discretion to an administrative body with respect to the details of their operations as is shown by the decision of this Court in *First National Bank* v. *Union Trust Company,* 244 U. S. 416. In that case an attack was made on the validity of Section 11 (k) of the Federal Reserve Act which gave the Federal Reserve Board power to grant by special permit to

[36] Respondents assert "the determination of the plan of operation is left entirely to the Board." (Respondents' brief, p. 49.) They then list a number of different plans of operation which the Board might select, the Terminating Plan, the Serial Plan, etc. The selection of one of these plans of operation is no more a legislative function than is the determination of whether a mercantile corporation shall sell for cash or credit, or, if for credit, on what terms.

national banks (when not in contravention of state or local law), the right to act as trustee, executor, administrator, etc., or in any other fiduciary capacity in which state banks or other corporations which compete with national banks were permitted to act under the laws of the state in which the national bank was located. The section provided:

> In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly.

The Court rejected the contention that this section improperly delegated legislative power to the Federal Reserve Board, saying (p. 427):

> * * * we think it necessary to do no more than say that a contention which was pressed in argument and which it may be was indirectly referred to in the opinion of the court below that the authority given by the section to the Reserve Board was void because conferring legislative power on that Board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field* v. *Clark,* 143 U. S. 659; *Buttfield* v.

Stranahan, 192 U. S. 470; *United States* v. *Grimaud,* 220 U. S. 506; *Monongahela Bridge Company* v. *United States,* 216 U. S. 177; *Intermountain Rate Cases,* 234 U. S. 476.

The discretion given the Federal Home Loan Bank Board by Section 5 is clearly no wider than the discretion conferred on the Federal Reserve Board by Section 11 (k).

No unfettered discretion is conferred on the Board by Section 5. The various subparagraphs of the section set up definite standards for the guidance of the Board in organizing and supervising savings and loan associations and prescribing the details of their operations. Thus: (1) the Board must give primary consideration to the best practices of local mutual thrift and home financing institutions (subparagraph (a)); (2) no charter shall be granted except to persons of good character and responsibility (subparagraph (e)); (3) no charter shall be granted unless, in the judgment of the Board, a necessity exists for such an institution in the community to be served (subparagraph (e)); (4) no charter shall be granted unless there is a reasonable probability of the usefulness and success of the association (subparagraph (e)); and (5) no savings and loan association shall be established unless it can be established without undue injury to properly conducted existing local thrift and loan financing institutions (subparagraph (e)). Furthermore, Section 5 clearly defines the

powers to be possessed and exercised by Federal savings and loan associations. Subparagraph (b) prescribes the method by which the capital of an association shall be raised and restricts its right to accept deposits and to issue certificates of indebtedness. Subparagraph (c) lays down conditions and limitations with respect to the making of loans by associations and authorizes them to invest in obligations of the United States or in stocks or bonds of a Federal Home Loan Bank. Subparagraph (f) requires each association to be a member of the Federal Home Loan Bank of the district in which it is located. Subparagraph (k) authorizes Federal savings and loan associations to act as fiscal agents of the Government and as agents for any other instrumentality of the United States.

The standards set up to guide the Board are given form and content by the provisions of the section which limit and define the powers of savings and loan associations and state the purposes they are intended to serve, and by the general subject matter of the section.[37] Legislation contain-

[37] This is particularly true with respect to the discretion conferred by subparagraph (d) which gives the Board power to provide rules and regulations for the reorganization, consolidation, merger, or liquidation of savings and loan assocations, to appoint a conservator or receiver to take charge of the affairs of any such association, and to require an equitable readjustment of its capital structure and to release it from such control and permit its further operation. Clearly, this discretion must be exercised within the framework of the section, and in the light of the purpose Federal savings and loan associations are intended to accomplish.

ing standards expressed in general terms has been upheld when those terms were given content by the other provisions of the law and by the nature of the subject regulated. See *New York Central Securities Corporation* v. *United States*, 287 U. S. 12. That case involved section 5 (2) of the Interstate Commerce Act, 41 Stat. 481, which authorized the Interstate Commerce Commission to approve acquisitions of stock by railroads in other railroads "whenever the Commission is of opinion * * * that the acquisition * * * will be in the public interest". Section 5 (2) did not refer to any other portion of the Interstate Commerce Act as defining the phrase "public interest" or giving it substance and meaning, and no other section of the Act did so. The Court upheld the delegation in this Act upon the ground that "public interest" was given content by the provisions and manifest purposes of the Transportation Act of 1920 viewed as a whole. The Court said (pp. 24–25):

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest". It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.

Read in their entirety, the provisions of Section 5 so define the conditions under which the Federal

Home Loan Bank Board is to act, and so limit and restrict the field within which it is to act, that the section fully complies with the established principles of law relating to the delegation of legislative power.

V

THE CONVERSION OF PETITIONERS INTO FEDERAL SAVINGS AND LOAN ASSOCIATIONS DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE STATE OF WISCONSIN

The issue presented in these causes is whether a Wisconsin building and loan association, with the consent of its stockholders, and in the absence of objection by its creditors, can convert itself into a Federal savings and loan association without the consent of the State. No rights of creditors or stockholders are involved. No stockholder or creditor is a party in any of these cases. The records do not show that any stockholder or creditor is now objecting to the conversion of petitioners into Federal savings and loan associations.[38] The records do show that the conversion of each petitioner was approved by more than two-thirds of its outstanding capital stock.[39] In these circumstances no ques-

[38] In cause No. 55 the respondents alleged in their petition in the Supreme Court of Wisconsin that they were informed and believed that there were stockholders who did not desire the association to convert into a Federal savings and loan association (R. 15). In the petitioner's answer this allegation was denied (R. 45).

[39] In No. 55, in the answer of Hopkins Federal Savings and Loan Association filed in the proceeding in the Supreme

tion of the constitutional rights of stockholders or creditors of petitioners can be raised because the State of Wisconsin has no standing to enforce those.

Court of Wisconsin, it is alleged that at a regularly called meeting of its stockholders on May 31, 1934, at which there were represented in person the owners and holders of 2,761 shares and by proxy 3,212 shares, a resolution was unanimously adopted authorizing the conversion into a Federal savings and loan association. It is also alleged that at the time of the meeting there were outstanding 6,949 shares. (No. 55, R. 47–49.)

In No. 56 the affidavit of A. G. Pfulgradt, secretary of Reliance Building and Loan Association, filed in the proceeding in the Circuit Court of Milwaukee County, Wisconsin, states that at a meeting of said association held August 20, 1934, for the purpose of voting to convert said association into a Federal savings and loan association there were present in person stockholders owning 3,049 shares and by proxy 4,303 shares; that 7,286 shares of the stock present voted in favor of conversion and 66 shares of stock voted against conversion and that at the time of the said meeting there was a total of 10,885 shares of stock outstanding. (No. 56, R. 32.)

In No. 57 the affidavit of B. F. Kuehlhorn, secretary of the Northern Building and Loan Association, filed in the proceeding in the Circuit Court of Milwaukee County, Wisconsin, shows that at a special meeting held by the stockholders for the purpose of voting on conversion of said association into a Federal savings and loan association, there were represented in person or by proxy 23,302 shares, out of a total of 35,308 outstanding at the time of the meeting, and that a resolution in favor of conversion was adopted by a vote of 23,291 to 11. (No. 57, R. 33.)

It should be noted that under Section 215.335 of the Wisconsin statute, a vote of two-thirds of the authorized outstanding stock is sufficient to authorize the consolidation of a building and loan association; and that under Section 215.36, a two-thirds vote of all authorized outstanding stock is sufficient to authorize dissolution. (Wisconsin statutes, 1933, 12th Ed., pp. 1923, 1926.)

rights. In *Massachusetts* v. *Mellon*, 262 U. S. 447, the State of Massachusetts attempted to enjoin the enforcement of an Act of Congress appropriating money to be used in cooperation with the states to reduce maternal and infant mortality. On behalf of Massachusetts, it was contended that it could maintain the suit as the representative of its citizens. With respect to this contention, the Court said (pp. 485–486):

> * * * It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

See also *Florida* v. *Mellon*, 273 U. S. 12.

Furthermore, no attempt is here being made to deprive the State of Wisconsin of control of *all* savings and loan associations, and no attack is made on its right to grant charters to such associations and to regulate those which choose to remain under

its jurisdiction. There is no basis for respondents' fear that the powers claimed by petitioners "can easily mean complete ruination of the several States" (Respondents' brief, p. 30), or for their statement that "If the Federal Government can thus seize our building and loan associations, logically it can then take away all of our corporations" (Respondents' brief, pp. 52–53). These causes involve only one special class of corporations and even as to that class petitioners claim no right of conversion without the consent of the corporation, or in defiance of the rights of creditors or stockholders.

The respondents assert that the charter issued by the State is a contract that cannot be discharged by the consent of only one of the parties thereto, and that the State has important rights and interests under the contract which cannot be violated. (Respondents' brief, p. 23.) Respondents' own description of these alleged rights discloses that they are political in character and not proprietary. Respondents assert:

> In consideration of the granting of the charter the corporation promised and agreed to carry on an important government function of the State under its supervision and control until such time as the holders of two-thirds of all its outstanding capital stock determine that they no longer desire to carry on this function. (Respondents' brief, p. 23.)

In each of the instant cases the holders of more than two-thirds of the outstanding stock voted in favor of conversion and hence this contract right has been respected. Furthermore, it should be noted that there is no Wisconsin statute expressly forbidding conversion. But quite apart from these considerations, respondents' own words show that this asserted right is not proprietary in nature. Ultimately this right arises not from the charter contract but from the state's sovereign power to grant charters to, and regulate, corporations. The state has no financial interest of its own in the "important governmental function" which it contends a savings and loan association carries on. It does not contend that it will suffer any pecuniary loss by reason of the conversion of a Wisconsin savings and loan association into a federal institution.

Respondents also assert:

> It is further agreed by the charter that upon such determination to cease doing business as an instrumentality of the State the affairs of the Association would be liquidated under the control of the State and all creditors and stockholders paid their interest in cash. (Respondents' brief, p. 23.)

But it cannot be contended that the State of Wisconsin will suffer any pecuniary loss if the affairs of a savings and loan association are not liquidated under its control. If there is a contractual obligation to pay all creditors and stockholders in cash prior to conversion, its benefits run to creditors

and stockholders, and it cannot be enforced by respondents in these proceedings."[40]

Thus, there is here presented no question of impairment of property or contractual rights. It follows that there are at least three conclusive answers to respondents' contention that the constitutional rights of the State of Wisconsin are violated by the conversion of petitioners.

In the first place, the rights of the state being political and not proprietary or contractual in character are not protected by the Fifth Amendment on which respondents apparently rely. Chief Justice Marshall, in *Dartmouth College* v. *Woodward,* 4 Wheat. 518, speaking of the provision of Section 10, Article I, of the Constitution which prohibits the state from passing a law impairing the obligation of a contract, said, at p. 628:

> The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value and confer rights which may be asserted in a court of justice.

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[40] Respondents assert "The State statutes guaranteed these stockholders that the association would operate under the control of the State. They were further guaranteed by State legislation that upon cessation of business as a State instrumentality they would receive their interest in cash after liquidation by the State." (Respondents' brief, pp. 23–24.) The state statutes are clearly not a "guarantee" in any strict sense. Respondents neither advance any reasons nor cite any authority for their apparent contention that this so-called "guarantee" authorizes the state to enforce the contractual and proprietary rights of stockholders and creditors.

If this is true of a provision expressly forbidding the impairment of contracts, *a fortiori* it must be true of the Fifth Amendment which does not expressly refer to contracts but merely forbids the taking of *property* without due process of law.

In the second place, the courts of the United States will not protect purely political rights of a state unless invasion of those rights will destroy or damage a proprietary interest of the state. See *Georgia* v. *Stanton*, 6 Wall. 50;[41] *Massachusetts* v. *Mellon*, 262 U. S. 447; *Florida* v. *Mellon*, 273 U. S. 12; see also *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

Finally, the conversion of a savings and loan association does not violate even the political rights of the State of Wisconsin. It has been shown (pp.

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[41] In *Georgia* v. *Stanton*, 6 Wall. 50, this Court held that a bill to enjoin the Secretary of War, and other officers, from carrying into execution certain acts of Congress, which it was asserted would annul and abolish the existing state government and establish another and different one in its place, called for a judgment upon a political question and presented no case within the jurisdiction of the Court. The Court said (6 Wall. 77):

> "That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."

17–36, *supra*) that the Federal Government has the power to organize savings and loan associations. In the exercise of this power it can, without the consent of the State of Wisconsin, organize a savings and loan association to operate within the boundaries of the state, and it can legislate with respect to that association, without violating any of the political rights of the state. It can achieve the same result by authorizing an existing Wisconsin corporation to convert itself into a Federal savings and loan association, because the power to convert is coextensive with the power to create. This was established by the decision in *Casey* v. *Galli*, 94 U. S. 673, discussed above on pp. 11–14, where this Court said (p. 678):

> "* * * No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the Forty-fourth Section of the Banking Act of Congress, 13 Stat. 112. The power there conferred was ample, *and its validity* cannot be doubted. The Act is silent as to any assent or permission by the State. *It was as competent for Congress to authorize the transmutation as to create such institution originally.*" (Italics supplied.)

The State of Louisiana was not a party to that proceeding, but it seems clear, nevertheless, that the Court had no doubt as to the power of the United States to authorize conversion without the State's consent.

It is true that there was an alternative ground for the decision in *Casey* v. *Galli*, 94 U. S. 673, i. e., that the shareholder was estopped to deny the corporate existence, but that was clearly an *alternative* ground and the language of the Court shows that it entertained no doubt as to the soundness of its decision on the question of power. Furthermore, it should be noted that the decision in *Casey* v. *Galli*, 94 U. S. 673, was cited by this Court in *Ex parte Worcester County National Bank*, 279 U. S. 347, with no indication that it now entertained any doubt as to the correctness of that decision. Unless *Casey* v. *Galli* is to be overruled, it is decisive in the cases at bar.

Respondents contend that the decision in *Casey* v. *Galli* is to be distinguished on the ground that the power of Congress with reference to currency and banking is *exclusive*. (Respondents' brief, p. 27.) As applied by respondents in the instant cases, the distinction between exclusive and concurrent powers is illusory.[42] When the federal government has the power to legislate in a certain field that power is paramount, even though a state may possess a concurrent power with respect to the same subject matter. "It is well settled that if the State

[42] Respondents themselves appear to recognize that their explanation of *Casey* v. *Galli* is unsatisfactory and they are driven to the assertion that the decision there "stretches the Federal Constitution to the breaking point," (Respondents' brief, p. 30), thus making what is tantamount to a plea that the decision be overruled.

and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised." *Southern Railway Co.* v. *Reid*, 222 U. S. 424, 436.[43] Thus, a state can regulate intrastate railway rates, but so may the federal government when those rates affect interstate commerce, and if it does, it can regulate such rates in violation of a contract between a state and a carrier. See *New York* v. *United States*, 257 U. S. 591. It is on this elementary principle of constitutional law that the decision in *Casey* v. *Galli*, 94 U. S. 673, rests, not on any distinction between exclusive and concurrent powers. Nor did the decision in that case depend upon the fact that the corporation there involved was a bank,[44] but rather upon the broad principle that the power of the federal government to create a corporate agency carries with it the power to authorize the conversion of such an agency without the consent of the state under whose laws it is organized. It is this power that the United States has asserted here and its exercise violates no rights of the State of Wisconsin.

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[43] Compare *Florida* v. *Mellon*, 273 U. S. 12, 17. "Whenever the constitutional powers of the federal government and those of the state come into conflict the latter must yield."

[44] Respondents emphasize that the statutes of Wisconsin contain detailed provisions with respect to the nature and the operation of building and loan associations (Respondents' brief, pp. 4–7, 52). This is equally true of banking corporations which in practically all states are subject to detailed statutory provisions. That fact does not prevent the federal government from authorizing their conversion into federal institutions. See *Casey* v. *Galli*, 94 U. S. 673.

CONCLUSION

It is respectfully submitted that Section 5 (i) of the Home Owners' Loan Act of 1933 authorizes the petitioner corporations to convert themselves into Federal savings and loan associations without the consent of the State of Wisconsin and that Section 5 (i) is a lawful exercise of the constitutional powers of Congress.

STANLEY REED,
Solicitor General.
GOLDEN W. BELL,
Assistant Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

Nos. 55, 56, and 57.—October Term, 1935.

Hopkins Federal Savings and Loan Association, et al., Petitioners,
55 *vs.*
Peter A. Cleary, S. N. Schafer and H. F. Ibach, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, Respondents.

Reliance Building and Loan Association, Petitioner,
56 *vs.*
Peter A. Cleary, S. N. Schafer and H. F. Ibach, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, et al., Respondents.

Northern Building and Loan Association, Petitioner,
57 *vs.*
Peter A. Cleary, S. N. Schafer and H. F. Ibach, Constituting the Banking Commission of the Banking Department of the State of Wisconsin, et al., Respondents.

On Writs of Certiorari to the Supreme Court of the State of Wisconsin.

[December 9, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy in each of these causes is one as to the meaning and validity of an Act of Congress whereby building and loan associations organized under the laws of a state may be converted into Federal Savings & Loan Associations upon the vote of a majority of the shareholders present at a meeting legally convened.

In number 55, an original suit was brought in the Supreme Court of Wisconsin by the respondents, constituting the Banking Commission of that state, against the Hopkins Federal Savings & Loan Association, formerly the Hopkins Street Building & Loan Association, its officers and directors. The complaint prayed for a decree annulling the proceedings whereby the state association had

attempted to convert itself into a federal one, and compelling the directors and officers to continue the business in accordance with Wisconsin law or else to wind it up. The state court granted the decree upon grounds to be considered later. ~~257 N. W. 684.~~ 217 Wis. 179;

In numbers 56 and 57, suits were brought by Wisconsin corporations, the Reliance Building and Loan Association (plaintiff in number 56) and the Northern Building and Loan Association (plaintiff in number 57) to restrain the Banking Commission and the supervisor of building and loan associations from interfering with the plaintiffs in the attempt to convert themselves into federal corporations. Decrees of the trial court in favor of the plaintiffs were reversed by the Supreme Court of Wisconsin with directions to enter judgment in favor of the Commission. 257 N. W. 684.

Building and loan associations organized in Wisconsin are subject to strict supervision by the administrative agencies of the state both in the course of doing business and in that of liquidation. They are quasi-public corporations, chartered to encourage thrift and promote the ownership of homes, with powers and immunities peculiarly their own. See Wisconsin Statutes, 1933, Chap. 215, §§ 215.01 et seq; cf. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 40; *United States* v. *Cambridge Loan & Building Co.*, 278 U. S. 55, 57.[1] They may loan their moneys to members only. Wisconsin Statutes, 1933, § 215.07 (1). They must submit many of their proposed investments for the approval of the Commissioner of Banking. § 215.07 (6) (7) (8). They must conform to precise restrictions as to the quality of mortgages accepted as security for loans. § 215.15;[2] cf. § 215.01 (10) (11). At the close of every year they must submit to the Commissioner a report of their condition (§ 215.31); and at all times they shall be subject to his control and supervision. § 215.31. If their business has been conducted in a manner contrary to law, or if their

[1] Cf. Bibb County Loan Association v. Richards, 21 Ga. 592, 595, 596; First National Bank v. County of Dawson, 66 Mont. 321, 335; Washington Investment Association v. Stanley, 38 Oregon 319, 330, 331; Investment Co. v. Salt Lake County, 44 Utah 397, 404, 405; Becket v. Uniontown Building and Loan Association, 88 Pa. 211, 216; Miller v. Prudential Banking & Trust Co., 63 W. Va. 107, 110; Mutual Building and Savings Association v. Wilkinson, 8 F. (2d) 183; 13 F. (2d) 997, 998.

[2] These restrictions should be compared with those imposed by the Home Owners Loan Act upon federal associations organized for kindred purposes. 48 Stat. 128, 132; 12 U. S. C. § 1464 (a).

financial condition appears to be unsound, the Commissioner may take charge of the business and liquidate the assets. § 215.33. In recognition of their quasi-public functions they are given an exemption from income taxes payable by corporations generally. § 71.05 (d). Cf. *United States* v. *Cambridge Loan & Building Co., supra.* The statute contains provisions governing the consolidation of such associations and their voluntary dissolution. Corporations formed thereunder may consolidate with other building and loan associations located in the same county, but only with the consent of the Commissioner of Banking and that of two thirds of the outstanding shares as well as the consent of a majority of the directors. § 215.335. A vote of approval by two thirds of the outstanding shares is necessary also for voluntary dissolution. § 215.36 (1). With the consent of the Commissioner an association formed under the act may become a member of a Federal Home Loan Bank, or a borrower therefrom. § 215.07 (7) (8). Membership in such a bank grows out of a subscription to its shares, and has no effect upon the corporate life of the subscribing member. On the other hand, there is nothing in the statutes of Wisconsin whereby building and loan associations chartered in that state may be transmuted into associations chartered by the federal government.

The petitioners insist that without the consent of Wisconsin the transmutation from a state into a federal association has become possible now by virtue of an Act of Congress. The Act relied upon for that purpose is section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended in April, 1934 (48 Stat. 643, 645, 646), and again in May, 1935 (49 Stat. 297), 12 U. S. C. § 1464. By subdivision (a) of that section the Federal Home Loan Board is empowered to issue charters for the creation of Federal Savings and Loan Associations "in which people may invest their funds and in order to provide for the financing of homes." By subdivision (e), "no charter shall be granted except to persons of good character and responsibility", nor unless in the judgment of the Board the institution is likely to be successful and is necessary for the well being of the community to be served. By other subdivisions (b, c, d, f, g, h, j and k) the powers and duties of the associations are defined. Subdivision (i), the one that concerns us specially, permits state associations to be converted into

federal ones. As amended in April, 1934, its provisions are as follows:

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."[3]

The exchange of a state for a federal charter may be made under this section by any member of a Federal Home Loan Bank. To ascertain the limits of that membership we turn to the "Federal Home Loan Bank Act" of 1932 as amended from time to time. 47 Stat. 725; 48 Stat. 128, 643, 1246; 12 U. S. C. chap. 11; cf. 49 Stat. 297. We learn from that act that the term "member" means any institution which has subscribed for the stock of a Federal Home Loan Bank (§ 2 [4]), and that "any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company or savings bank", shall be eligible to become a member of a Federal Home Loan Bank, or a non-member borrower from such a bank, upon compliance with conditions not important at this time. §§ 4 and 5.

Each of the three building and loan associations, the petitioners before us, was a member in good standing of the Federal Home Loan Bank of Chicago, Illinois. After application in proper form each received from the Board permission to convert itself into a federal association under § 5 (i) of the Federal Home Loan Act. Each convened a meeting of its shareholders to consider such action and approve or disapprove it. At the meeting of the Hopkins Street Building and Loan Association, held on May 31, 1934, 5,973 shares were represented in person or by proxy. A resolution authorizing the change was unanimously adopted. Shares out-

[3] The following is the text of this subdivision before the date of the amendment:

"Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided by the law under which it operates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

standing and not represented numbered 976. This association (under the name of Hopkins Federal Savings & Loan Association) has received a charter from the Board, under which it will act unless restrained. At the meeting of Reliance Building & Loan Association, held August 20, 1934, 7,286 shares were voted in favor of the change and 66 against it; shares outstanding and not represented numbered 3,533. At the meeting of Northern Building and Loan Association, held August 14, 1934, 23,291 shares were voted in favor of the change and 11 against it; shares outstanding and not represented numbered 12,006.

The State of Wisconsin, acting through its Banking Commission, came forward at this point to check the process of conversion. It took the position (1) that § 5 (i) of the Home Owners' Loan Act was subject to an implied condition whereby no conversion was to be permitted in contravention of local laws; and (2) that if this reading of the section were to be rejected as erroneous, the statute to that extent was void under the Tenth Amendment as an unconstitutional trespass upon the powers of the states. Other provisions of the Constitution, believed not to be material, were invoked at the same time.

The Supreme Court of Wisconsin placed its decision upon the first of these positions to the exclusion of the other. It read the federal statute as subject to the implied condition contended for by the state officials. It did this to avoid embarrassing and doubtful questions of constitutional power, which it described without deciding. To determine the meaning and, if need be, the validity of an important federal statute, writs of certiorari were granted by this court.[4] 295 U. S. 721.

First: Congress did not mean that the conversion from state associations into federal ones should be conditioned upon the consent of the state or compliance with its laws.

Under § 5 (i) as enacted in 1933, the argument could have been made with force that the laws of the state must be obeyed in the process of conversion. The provision then was, as we have already pointed out, that the association was to act "upon a vote of its stockholders as provided by the law under which it operates."

[4] At the same time we dismissed the appeals that had been taken from the judgments, the remedy of appeal being held to be inappropriate for the reason that the validity of the statute was untouched by the decision brought here for review. Section 237 (a), Judicial Code; 43 Stat. 936, 937.

But Congress would not leave it so. By an amendment of the statute, approved April 27, 1934, there was substituted a provision that conversion would be effective "upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action." Thus Congress erected a standard of its own, which was to be uniform in all the states irrespective of the local laws. A bare majority of the shares voted at a meeting was to be enough to give authority for fundamental changes of policy and power, no matter how many other shares were unrepresented at the meeting. We are unable to accede to the suggestion of the court below that the percentage was meant to be a minimum which the local laws might raise, though they were powerless to reduce it. Nothing in the wording of the statute gives support to that construction. On the contrary, comparison of the act as amended with the act as first adopted impels to the conclusion that Congress had in mind to take possession of the field to the exclusion of other occupants. Thereafter the procedure for conversion and the power to convert were to be governed by a uniform rule, irrespective of repugnant limitations prevailing in the states.

Whatever doubt might exist as to the correctness of this view disappears when other and cognate statutes are subjected to our scrutiny.

The National Banking Act of 1864 (13 Stat. 99, 112, 113) gave permission to the banks incorporated in the states to become national associations upon the consent of the owners of two thirds of the capital stock, the consent to be evidenced by an appropriate certificate. This court in *Casey* v. *Galli*, 94 U. S. 673, decided in 1876, refused to read into the act a condition that the state as well as the stockholders must consent to the conversion, though no question of constitutional power was necessary to the decision, as will be shown later on. The statute as thus interpreted remained substantially unchanged until 1913, when the percentage was reduced from two thirds to a majority, with the addition of a proviso "that said conversion shall not be in contravention of the state law". R. S. § 5154; 38 Stat. 258; 12 U. S. C. § 35. Cf. 12 U. S. C. § 342; *Ex parte Worcester National Bank*, 279 U. S. 347.[8]

[8] Complementary statutes permitting the conversion are common in the states. See, e. g., Mich. Comp. Laws, 1929, § 11957; N. Y. Banking Law (McKinney's Consol. Laws) §137; Purdon's Penna. Stats., Title 7, chap. 14; Wis. Stats., 1933, § 221.21.

Again, in the Act of March 4, 1923, whereby agricultural or live-stock financing corporations organized in the states were permitted to convert themselves into National Agricultural Credit Corporations, the permission was coupled with a similar proviso. 42 Stat. 1454, 1469; 12 U. S. C. § 1281.

Congress had no difficulty in finding fit and simple phrases for the expression of its will when power was to be conditioned upon the approval of the states. Cf. *Westfall* v. *United States*, 274 U. S. 256, 259. The form chosen by its draftsman for the statute here involved takes on a new significance when read in the revealing light of the forms that were rejected.

We think the light is so strong as to flood whatever places in the statute might otherwise be dark. Courts have striven mightily at times to canalize construction along the path of safety. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379. When a statute is reasonably susceptible of two interpretations, they have preferred the meaning that preserves to the meaning that destroys. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205; cf. *Illinois Central R. Co.* v. *Public Utilities Co.*, 245 U. S. 493, 510; *Savage* v. *Jones*, 225 U. S. 501, 533. "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose*, *supra*. "Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *Ibid.* The problem must be faced and answered.

Second: The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states. United States Constitution, Amendment X.

If § 5 (i) may be upheld when state laws are inconsistent, any savings bank or insurance company as well as any building and loan association, may be converted into a savings and loan association with a charter from the central government, provided only that 51 per cent of the shares represented at a meeting vote approval of the change. Indeed, as counsel for the petitioners insisted at our bar, the power of transformation, if it is adequate in such conditions, is not confined to building and loan associa-

tions or savings banks or insurance companies or to members of the Home Loan Bank, except by the adventitious features of this particular enactment. It extends in that view to moneyed corporations generally and even to other corporations if Congress chooses to convert them into creatures of the federal government. Compulsion, by hypothesis, being lawful, the percentage of assenting shares voted in a given instance or exacted by a given statute assumes the aspect of an accident. Fifty-one per cent is the minimum required here. Another act may reduce the minimum to ten per cent or even one, or dispense with approval altogether. If non-assenting shareholders or creditors were parties to these suits, the question would be urgent whether property interests may be so transformed consistently with the restraints of the Fifth Amendment. The Wisconsin courts hold that the protest of a single shareholder will check "a fundamental and radical change" in the powers and purposes of the corporation, though the change be brought about by voluntary amendment. See opinion of the court below; also *Martin Orchard Co.* v. *Fruit Growers Canning Co.*, 203 Wisc. 97; *Huber* v. *Martin*, 127 Wisc. 412. Shareholders and creditors being absent, we have instead the question whether consistently with the Tenth Amendment the change may be made under license of the central government against the protest of the state.

For the purposes of these cases we find it needless to consider whether Congress has the power to create building and loan associations and thereupon to invest them with corporate capacity. As to that we do not indicate an opinion either one way or the other. The critical question here is something very different. The critical question is whether along with such a power there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation.

A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 668-672. Cf. the statutes and decisions collected by Brandeis, J. in *Liggett Co.* v. *Lee*, 288 U. S. 517, 548, et seq. This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings

them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. *Louisville Gas & Electric Co.* v. *Coleman, supra.* They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. See opinion of the court below, and cf. *Thomas* v. *West Jersey R. Co.*, 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24. How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.

Wisconsin, planning these agencies in furtherance of the common good and purposing to preserve them that the good may not be lost, is now informed by the Congress, speaking through a statute, that the purpose and the plan shall be thwarted and destroyed. By the law of the state, associations such as these may be dissolved in ways and for causes carefully defined, in which event the assets shall be converted into money and applied, so far as adequate, to the payment of the creditors. By the challenged Act of Congress, the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the nation. In this there is an invasion of the sovereignty or quasi-sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment.

We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount. *The Minnesota Rate Cases*, 230 U. S. 352, 399, 400; *Savage* v. *Jones*, 225 U. S. 501, 533; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 485; *Mintz* v. *Baldwin*, 289 U. S. 346, 350. That is not the situation here. No one would say with reference to the business conducted by these petitioners that Congress could prohibit the formation or continuance of such associations by the states,

whatever may be its power to charter them itself. So also we are not concerned with the rule to be applied where the business of an association under charter from a state is conducted in such a way as to be a menace or obstruction to the legitimate activities of its federal competitors. Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344, 345, 346; *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342, 351; *New York* v. *United States*, 257 U. S. 591, 600, 601. For anything here shown, the two classes of associations, federal and state, may continue to dwell together in harmony and order. A concession of this possibility is indeed implicit in the statute, for conversion is not mandatory, but dependent upon the choice of a majority of the voters. The power of Congress in the premises, if there is any, being not exclusive, but at most concurrent, and the untrammeled coexistence of federal and state associations being a conceded possibility, we are constrained to the holding that there has been an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states. Cf. *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *De Witt*, 9 Wall. 41, 45. The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends.[*]

Given the encroachment, the standing of the state to seek redress as suitor is not to be gainsaid, unless protest without action is the only method of resistance. Analogy combines with reason in telling us that this is not the law. By writs of *quo warranto* as well as through other remedial devices the state has been accustomed to keep its juristic creatures within the limits of the charters that define the purpose of their being. *People* v. *Ballard*, 134 N. Y. 269; *Attorney General* v. *Utica Insurance Co.*, 2 Johns Ch. 371. The practice is so inveterate that it may be ranked as rudimentary. Indeed, there are many situations where no one other than the state will be held to be aggrieved, with the result that capacity to sue is either there or nowhere. *Kerfoot* v. *Farmers' & Merchants'*

[*] The court has upheld the validity of a statute whereby national banks are given the same power as state banks to act as executors or administrators, to the end that the two classes of banks may compete on equal terms. First National Bank v. Union Trust Co., 244 U. S. 416. This is far from a holding that the function of acting as executors and administrators may be withdrawn from the state banks and lodged by the Congress in the national banks alone.

Bank, 218 U. S. 281, 286, 287; *National Bank* v. *Matthews*, 98 U. S. 621, 629. As against the protest of the state, asserting its public policy or the prohibition of a statute, no assent by shareholders, however general or explicit, will be permitted to prevail. *McCandless* v. *Furlaud*, Nov. 11, 1935, — U. S. —. It is of no moment in such conditions that the interest of the state in repelling the encroachment is other than pecuniary. *Missouri* v. *Holland*, 252 U. S. 416, 431. At least there is "a matter of grave public concern in which the state as the representative of the public has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 591, 592. *Cf. North Dakota* v. *Minnesota*, 263 U. S. 365, 374; *New York* v. *New Jersey*, 256 U. S. 296, 301, 302; *Heckman* v. *United States*, 224 U. S. 413, 439, 440; *Kansas* v. *Colorado*, 185 U. S. 125, 141, 142; s. c. 206 U. S. 46, 99; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; *In re Debs*, 158 U. S. 564, 584, 586; *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 357, 367. In its capacity of quasi-sovereign, the state repulses an assault upon the quasi-public institutions that are the product and embodiment of its statutes and its policy. Finding them about to deviate from the law of their creation, it is met by the excuse that everything done or purposed is permitted by an Act of Congress. The excuse is inadequate unless the power to give absolution for overstepping such restrictions has been surrendered by the state to the Government at Washington.

The standing of Wisconsin to resist a trespass on its powers is confirmed if we view the subject from another angle of approach. In the creation of corporations of this quasi-public order and in keeping them thereafter within the limits of their charters, the state is *parens patriæ*, acting in a spirit of benevolence for the welfare of its citizens. Shareholders and creditors have assumed a relation to the business in the belief that the assets will be protected by all the power of the government against use for other ends than those stated in the charter. Aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the *parens patriæ* to keep faith with those who have put their trust in the parental power. True, most of the shareholders in the cases now before us assented to the change. Even so, an important minority were not represented at the meetings, and their approval is not shown. Creditors

other than shareholders have not been heard from at all. To these non-vocal classes the *parens* owes a duty which it is free to vindicate by suit.[1] *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355, 356; *Kansas* v. *Colorado*, *supra*; *Georgia* v. *Tennessee Copper Co.*, *supra*; *New York* v. *New Jersey*, *supra*; *Pennsylvania* v. *West Virginia*, *supra*.

The ruling in *Massachusetts* v. *Mellon*, 262 U. S. 447, is nothing to the contrary, though it is made a cornerstone of the argument in favor of the statute. There the state of Massachusetts attempted to enjoin the enforcement of an Act of Congress appropriating money to be used in cooperation with the states to reduce maternal and infant mortality. The ruling was that it was no part of the duty or power of a state to enforce the rights of its citizens in respect of their relations to the Federal Government. Cf. *Florida* v. *Mellon*, 273 U. S. 12. Here, on the contrary, the state becomes a suitor to protect the interests of its citizens against the unlawful acts of corporations created by the state itself.

Much reliance is placed in behalf of the petitioners upon the decision of this court in *Casey* v. *Galli*, *supra*. The Bank of New Orleans, a Louisiana corporation, became a national banking association by vote of its stockholders. The state did not oppose the conversion, though it was not shown to have consented. The reorganized corporation did business for more than two years, when it failed and a receiver was appointed by the Comptroller of the Currency. In an action by the receiver against a shareholder to enforce the individual liability under the provisions of the federal statute, the defendant filed three pleas in abatement, to which the plaintiff demurred. The pleas were as follows: (1) *Nul tiel corporation;* (2) that there was not then, nor when the plaintiff became receiver of the New Orleans Banking Association, any such corporation in existence, because the Bank of New Orleans had no power under its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States; and (3) that

[1] The fact is not ignored, but is thought to be unimportant, that the vote in favor of conversion at two of the three meetings, being more than two thirds of the outstanding shares of stock, would have been sufficient to authorize a voluntary dissolution at a meeting duly called to consider such action. The same shareholders who voted to go on with the business under a charter from the Federal Government might have opposed dissolution as inexpedient or wasteful. Moreover, liquidation would then have followed under the supervision of the state.

there had been a failure to comply with the statutory conditions as to the method of conversion if conversion was permissible. The first plea was abandoned, and the third is without bearing upon the causes now before us. The court sustained the demurrer to the second plea upon two independent grounds, which will be stated inversely to the order in which they appear in the opinion. Thus stated they are these: (a) The defendant was estopped from contesting the validity of the change after standing by for over two years without making his objection known; and (b) apart from any estoppel, "no authority from the State was necessary to enable the bank so to change its organization." p. 678. "The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally." *Ibid.*

No question of constitutional power was in the case, for nowhere in the record did the defendant invoke the Tenth Amendment or the Fifth or any other provision of the Federal Constitution. The substance of the plea was this, that the change from one form of association to another was to be condemned as *ultra vires.* The meaning of the statute was thus the pivot of the controversy. The argument in the briefs was directed in the main to the formal correctness of the pleadings, the validity of the act being taken for granted. The assumption was one that could hardly be avoided when the controversy was viewed in the setting of the facts. Louisiana, like the defendant shareholder, had apparently acquiesced in the attempt of the central government to take over the state banks. The time had gone by to vindicate her majesty. What she might have done if she had been vigilant is a question not before us. Distinctions may conceivably exist between the power of the Congress in respect of banks of issue and deposit and its power in respect of associations to encourage industry and thrift. Whether that be so or not, all that was said in *Casey* v. *Galli* as to the condition of consent was unnecessary to the decision if it was meant to do more than define the meaning of the statute. We cannot accept it as determining the constitutional rights and privileges of a party not then before the court, least of all when it appears that constitutional rights and privileges were not invoked or argued.

Confining ourselves now to the precise and narrow question presented upon the records here before us, we hold that the conver-

sion of petitioners from state into federal associations is of no effect when voted against the protest of Wisconsin. Beyond that we do not go. No question is here as to the scope of the war power or of the power of eminent domain or of the power to regulate transactions affecting interstate or foreign commerce. The effect of these, if they have any, upon the powers reserved by the Constitution to the states or to the people will be considered when the need arises.

The judgments are

Affirmed.

A true copy.

Test

Clerk, Supreme Court, U. S.